B. Ambiguity in § 851(e)'s Scope

Although much has been written about § 851 enhancements,[1] Subsection (e) has been the focus of less scrutiny amongst scholars and courts alike. This might suggest that § 851(e)'s text is relatively straightforward with respect to both meaning and application. However, ambiguity may exist regarding the scope of § 851(e)'s temporal constraint. The potential ambiguity in § 851(e)'s scope is worth considering because the effects of the subsection are broadened if it can preclude the offender's challenge to both the existence and the constitutional validity of a prior conviction. Under § 851(c)(2), "*any* challenge to a prior conviction not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause" can be shown.[2] The word "any" includes, at minimum, the two kinds of aforementioned "challenges" to prior convictions expressly contemplated by § 851: fact (or existence) and validity. Therefore, if a defendant timely fails to contest in their response either the fact of the conviction or its constitutional validity without good cause for delay, then they are estopped from making such an argument after sentencing. However, whether the temporal prohibition of § 851(e) applies only to challenges made to the validity of prior convictions and not to challenges regarding the very fact of their existence is somewhat of an open question.

Because § 851(e) only refers to challenges made to "the validity" of any prior conviction,[3] it applies on its face to only one of the two types of collateral attacks referenced in § 851.[4] To read Subsection (e) more broadly would render superfluous the distinction between

[1] *See, e.g.*, Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1163–1170 (2010); Christopher Serkin, Note, *The Offense: Interpreting the Indictment Requirement in 21 U.S.C. § 851*, 98 MICH. L. REV. 827, 827 (1999).
[2] 21 U.S.C. § 851(c)(2) (emphasis added).
[3] 21 U.S.C. § 851(e).
[4] *See, e.g.*, 21 U.S.C. § 851(c)(1) ("If the person *denies* any allegation of the information of prior conviction, or claims that any conviction alleged is *invalid* . . . ." (emphasis added)).

outright denial and alleged invalidity drawn by § 851(c)(1)'s own terms.[5] Indeed, when provisions of § 851 seek to apply to all types of challenges to prior convictions, they say so explicitly (i.e., "[a]ny challenge") and without reference to "validity."[6] If § 851(e) applied to both types of challenges, one would expect to find similar language. Moreover, the primary reasons one might expect Congress to temporally limit collateral attacks on prior convictions—namely, judicial economy and procedural practicability[7]—are less relevant when the only thing the defendant seeks to challenge is the fact of a prior conviction's existence. Determining whether a conviction exists is typically easily verified by the record, while determining a conviction's constitutional validity can be a complicated and time-consuming endeavor. The interpretation of § 851(e)'s temporal limitation as applicable only to attacks against a prior conviction's constitutionality is also reflected in legislative history[8] and federal caselaw.[9]

However, in *St. Preux v. United States*, a *per curiam* opinion, the United States Court of Appeals for the Eleventh Circuit held that § 851(e) barred a federal prisoner who was serving a life sentence for a felony drug conspiracy, for which he was convicted in 2007, from reopening his sentence despite the fact that one of the predicate state convictions used to mandatorily enhance his sentence to life imprisonment had been subsequently vacated.[10] One might expect the defendant's delay in challenging the conviction's existence to be evaluated under the standard of "good cause" in § 851(c)(2).[11] Under the plain meaning of its text, § 851(e) should

[5] *Id.*
[6] *See e.g.*, 21 U.S.C. § 851(c)(2) (expressly waiving "[a]ny challenge to a prior conviction" not raised by the defendant's response to the government's information); *see also supra* Section II.A.
[7] As will be explored later in this paper, *infra* Sections II.C and III.A, concerns about the feasibility and cost of investigating the constitutionality of very old prior convictions lie at the heart of the rationales underlying statutory and constitutional limitations on criminal defendants' right of collateral attack under § 851.
[8] *See infra* Section II.C.
[9] *See, e.g.*, United States v. McChristian, 47 F.3d 1499, 1502–03 (9th Cir. 1995); Arreola-Castillo v. United States, 889 F.3d 378, 390 (7th Cir. 2018).
[10] St. Preux v. United States, 539 Fed. App'x 946, 948–49 (11th Cir. 2013) (per curiam).
[11] 21 U.S.C. § 851(c)(2).

have presented no barrier to reopening the defendant's sentence upon his renewed challenge to the existence of his prior conviction.

However, the Eleventh Circuit instead reasoned that, because the state court vacated the defendant's 1988 conviction after the government had used it for a § 851 enhancement in 2007, the challenge remained within the scope of § 851(e)'s temporal limitation,[12] despite the fact that the defendant's attack was now aimed at the existence of the conviction rather than its constitutional validity. In *Arreola-Castillo v. United States*, the Seventh Circuit expressly criticized the Eleventh Circuit's interpretation of § 851(e) in *St. Preux* and held that the subsection did not bar the reopening of a federal sentence where there was vacatur of a prior state conviction previously used to enhance the defendant's sentence.[13] Several federal circuit courts have reached a similar conclusion as the Ninth Circuit.[14] Thus, the potentially broader scope of Subsection (e)'s temporal limitation seems to be duly confined to the jurisdictional bounds of the Eleventh Circuit.

C. The Legislative History of § 851(e)

Under either interpretation of § 851(e)'s scope of applicability, the subsection itself generates an incongruous statutory right for criminal defendants facing recidivist enhancements when compared to the parallel constitutional right of collateral attack under *Custis*.[15] The statutory right of collateral attack under § 851 is both substantively more expansive and temporally more restrictive than the corresponding constitutional right. To fairly evaluate why Subsection (e)'s temporal limitation may be unwise or inequitable, it is helpful to first analyze

[12] *St. Preux*, 539 Fed. App'x at 948–49.
[13] *Arreola-Castillo*, 889 F.3d at 390.
[14] *See McChristian*, 47 F.3d at 1503; United States v. Gabriel, 559 Fed. App'x 407, 408 (2d Cir. 2015); United States v. Jespen, 944 F.3d 1019, 1023 (8th Cir. 2019).
[15] *See infra* Section III.A.

why the drafters of the Comprehensive Drug Abuse Prevention and Control Act of 1970 may have sought to limit the statutory right that they themselves created.

The House Report reveals little about why Congress adopted the statute of limitations in § 851 or any of the provisions contained therein.[16] Fortunately, the House debates regarding H.R. 18583 § 409, later codified at 21 U.S.C. § 851,[17] are revelatory. Subsection (e) was proposed as an amendment to § 409 by Mr. Charles Edward Wiggins,[18] who noted, upon offering the amendment, that "[u]nder this bill this right of collateral attack is unlimited, and it should be modified."[19] In contrast to the Eleventh Circuit's holding in *St. Preux*, Mr. Wiggins stated that "[i]t should be . . . emphasized . . . that this amendment affects challenges only to the validity of prior convictions and not challenges as to their existence."[20] Interestingly, Mr. Wiggins noted several means by which his amendment or the initial provision *could* have limited the right of attack, including by limiting challenges to validity only where the alleged defect was not "previously resolved by appeal or rejected in a separate collateral attack."[21]

The testimony of Mr. Wiggins and others fails to make clear why this temporal limitation in particular, as opposed to the other limiting mechanisms mentioned above or a different length of time, was adopted. However, Mr. Wiggins's closing remarks illuminate the underlying rationale for his introduction of the amendment and, presumably and in the absence of further debate, the reason for its subsequent adoption by the House: "[T]his amendment

[16] *See* H.R. REP. NO. 91-1444, at 4618 (1970) (describing § 409 as merely "prescrib[ing] the procedure for establishing prior convictions so as to authorize imposition of an increased penalty upon a subsequent conviction").
[17] *Id.*; Pub. L. No. 91-513, § 411, 84 Stat. 1269 (codified at 21 U.S.C. § 851).
[18] Mr. Charles Edward Wiggins was a republican representative from California elected to the U.S. House of Representatives from 1967 to 1979. U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, Wiggins, Charles Edward (Oct. 18, 2022), https://history.house.gov/People/Listing/W/WIGGINS,-Charles-Edward-(W000448)/.
[19] 116 CONG. REC. 33634 (1970).
[20] *Id.*
[21] *Id.*

addresses . . . one of the principal problems presently existing in the Federal Judiciary. Federal courts are clogged with proceedings to attach [sic.] collaterally prior convictions in State courts. I hope this amendment will . . . limit that burden."[22] The clogging to which Mr. Wiggins was likely referring was the significant increase in federal habeas petitions filed in the late 1950s and 60s, a phenomenon that arguably resulted from the Warren Court's expansion of the meaning of liberty interests under the Fourteenth Amendment.[23] In so doing, the Warren Court greatly expanded the constitutional claims available to serve as a basis for state prisoners' petitions for federal habeas relief,[24] and one consequence was an increase in such petitions.[25] As a result of Mr. Wiggins's amendment, § 409(e) was codified at 21 U.S.C. § 851(e) following the Act's passage in 1970.[26] Although legislative history is of uncertain value to many federal courts (including the U.S. Supreme Court) in matters of statutory interpretation,[27] it is undoubtedly useful in considering the normative question of whether § 851(e) serves a valuable function in the contemporary federal sentencing scheme, discussed further *infra* Section IV.

## III. The Constitutionality of § 851(e) and the Right of Collateral Attack

### A. A Foreclosed Argument

Litigating the constitutionality of § 851(e) could have, at one time, expanded the right of criminal defendants to collaterally attack prior convictions used in sentencing enhancement. For example, a federal court could have held § 851(e) unconstitutional on Fifth Amendment

[22] 116 CONG. REC. 33635 (1970).
[23] Stephen Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J. C.R. & C.L. 55, 66 (2014).
[24] *Id.* (recognizing that the Warren Court interpreted defendants' rights under the Fourteenth Amendment Due Process Clause as including "the right to exclusion of wrongfully seized evidence, the right to counsel in criminal proceedings, and the right to receive warnings prior to custodial police interrogations").
[25] *Id.*
[26] 116 CONG. REC. 4657–60 (1970).
[27] *See, e.g.*, Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 373–77 (1999).

substantive due process grounds by way of strict scrutiny analysis. While any argument that § 851 implicates a quasi-suspect or suspect classification seems highly unlikely to succeed under the Supreme Court's contemporary jurisprudence,[28] a court could have found, and indeed did find,[29] that the right to collaterally attack a prior conviction used as the basis for a sentencing enhancement is a fundamental constitutional right and that § 851(e) was not suitably tailored to serve a compelling state interest when it limited that right.[30] However, the federal circuit courts now deem the question of § 851(e)'s constitutionality to be foreclosed by the Supreme Court's holding in *Custis v. United States*.[31]

In *Custis*, the Supreme Court held that criminal defendants have no constitutional right to collaterally attack a prior conviction so long as it was obtained with some assistance of counsel.[32] In reaching this conclusion, the Court identified two sources of the right to collaterally attack federal sentencing enhancements: the Constitution[33] and congressional statutes.[34] Starting with the latter, the Court examined whether an express right of collateral attack sprung from "specific statutory authorization" in the relevant provisions of the Armed Career Criminal Act of 1984 ("ACCA").[35] Contrasting the ACCA provisions with Congress's express creation of a right to

[28] *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect . . . [a]liens as a class are a prime example of a 'discrete and insular' minority." (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938))); *see also* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138, 141 (2011) (noting that the Supreme Court has not clearly defined the test for what constitutes a suspect classification and has not expressly extended any particular level of scrutiny to several groups, including felons).
[29] United States v. Davis, 36 F.3d 1424, 1438 (9th Cir. 1994) ("[W]e were persuaded that Section 851(e) impinged on a criminal defendant's due process rights without a compelling government interest.").
[30] *See, e.g.*, Plyer v. Doe, 457 U.S. 202, 216–17 ("[W]e have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to . . . requir[e] the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.").
[31] *See, e.g.*, United States v. O'Neal, 2000 WL 328110, at *7 (9th Cir. 2006) (holding that the defendant's challenge to the constitutionality of § 851(e) is foreclosed by Supreme Court precedent).
[32] Custis v. United States, 511 U.S. 485, 496 (1994).
[33] *Id.* at 494 (citing Johnson v. Zerbst, 304 U.S. 458, 468 (1938)).
[34] *Id.* at 490.
[35] *Id.* at 490–91.

collaterally attack a prior conviction in 21 U.S.C. § 851(c),[36] the Court found that § 922(g) and § 924(e) of the ACCA lacked the clear language necessary to create such a right.[37]

Because the Court found no statutory right of collateral attack under the ACCA, the defendant-petitioner's last hope to prevail in *Custis* was through the Court's recognition of a constitutional right to collaterally attack all prior convictions used in federal sentencing enhancement, or at least those obtained in violation of the rights he complained of: ineffective assistance of counsel and the requirement that a guilty plea be knowing and intelligent, pursuant to the constitutional requirements of criminal procedure set out in *Strickland v. Washington*[38] and *Boykin v. Alabama*,[39] respectively.[40] Importantly, the Court had previously found that a criminal defendant had a constitutional right to collaterally attack a prior conviction that the state sought to use for sentencing enhancements when the prior conviction had been obtained in violation of *Gideon v. Wainwright* (i.e., without the assistance of counsel).[41]

Although it seemed that the defendant-petitioner had fairly strong precedential and functional arguments for broadly recognizing a right to collaterally attack prior convictions used for sentencing enhancements, the Court declined to extend the right to any constitutional violations beyond *Gideon* and those equivalent to the "jurisdictional defect" presented in *Gideon*.[42] *Custis* and its progeny do not make clear whether the Court would still entertain the argument that any other violations rise to the level of *Gideon*, or are of the "*Gideon*-type," in this

[36] *Id.* at 491–92.
[37] *Id.* at 490, 492 ("[W]hen Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so.").
[38] Strickland v. Washington, 366 U.S. 668, 687 (1984).
[39] Boykin v. Alabama, 395 U.S. 238, 244 (1969).
[40] Of course, the defendant-petitioner would still have had to prove that his constitutional rights were in fact violated in relation to the prior conviction, likely on remand, even if the Court had found a more expansive constitutional right of collateral attack.
[41] Custis v. United States, 511 U.S. 485, 486, 494–96 (1994).
[42] *Id.* at 496.

context.[43] Additionally, although not expressly relied upon by the Court as a basis for its holding, it is perhaps relevant that the defendant-petitioner remained in custody for the state convictions he challenged at the time of the Court's decision.[44] The defendant-petitioner's custodial status meant that he had an alternative federal habeas remedy to collaterally attack his prior convictions. If Mr. Custis prevailed in federal habeas review, he could "apply for reopening of any federal sentence enhanced by the state sentences"[45] to avoid the *fifteen-year* mandatory sentencing enhancement he faced.[46] Although this fact seems pertinent, the Court did not hinge the existence or breadth of the constitutional right of collateral attack on whether an alternative path exists for a criminal defendant to challenge the constitutional validity of their prior conviction(s).

Because the Supreme Court declined to recognize a broad constitutional right of collateral attack against prior convictions used in sentencing enhancements, it cannot follow that the statutory right of collateral attack under § 851 must exist to offenders for an unlimited period of time, or for any time at all, unless the invalidity alleged falls under *Gideon*.[47] Thus, after several failed challenges to 21 U.S.C. § 851(e)'s constitutionality in the federal circuit courts throughout the 1990s,[48] and despite some success in advancing such arguments in the Ninth

[43] *See id.*; Daniels v. United States, 532 U.S. 374, 378 (2001) (holding that, under the ACCA, a prior conviction no longer open to direct or collateral attack in its own right generally may not be challenged in federal habeas corpus proceedings due to the twin rationales of judicial efficiency and finality in judgment).
[44] *Custis*, 511 U.S. at 496.
[45] *Id.*
[46] *Id.* at 487.
[47] United States v. O'Neal, 2000 WL 328110, at *7 (9th Cir. 2006) ("[T]he Supreme Court refused to recognize any per se right (except for Sixth Amendment Gideon claims) to collaterally attack prior convictions used for sentencing enhancements . . . [t]he scope of *Custis* is broad. If Congress need not necessarily provide any method of collateral attack under the ACCA (which sometimes allows for life sentences), logically it can limit to five years the opportunity to challenge prior convictions [under § 851(e)], even if the potential enhancement is for life.").
[48] *See, e.g.*, United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992); United States v. Jenkins, 4 F.3d 1338, 1343 (6th Cir. 1993); United States v. Arango-Montoya, 61 F.3d 1331, 1338 (7th Cir. 1995); United States v. McChristian, 47 F.3d 1499, 1503 (9th Cir. 1995).

Circuit,[49] the Supreme Court's decision in *Custis v. United States* effectively foreclosed arguments challenging the constitutionality of § 851(e).

B. Expanding *Custis* Beyond *Gideon* is Unlikely

The effect of *Custis* is that a violation of the right to counsel is the sole constitutional defect for which criminal defendants have an independent constitutional right to collaterally attack prior convictions used as the basis for recidivist enhancements in federal sentencing. Although the Court expressly declined to extend the right of collateral attack beyond *Gideon* and those violations "ris[ing] to the level of a jurisdictional defect resulting from the failure to appoint counsel at all,"[50] it did not expound upon what, if any, other constitutional violations would rise to such a level. It did, however, identify two primary rationales for why *Gideon* and constitutional defects rising to its level should be treated uniquely: (1) there is greater ease of administration in failure-to-appoint-counsel cases because such a defect is generally readily apparent from the record;[51] and (2) limiting the constitutional right to collaterally attack prior convictions promotes the finality of judgments, which serves the administration of justice.[52]

One method of strategically expanding the defendant's right to collaterally attack prior convictions under § 851(e) could be to argue for an additional categorical constitutional right of collateral attack beyond *Gideon* violations. In addition to the fact that it is difficult to imagine a

[49] United States v. Vea-Gonzales, 999 F.2d 1326, 1333 (9th Cir. 1993) (holding that "the Constitution requires that defendants be given the opportunity to collaterally attack prior convictions which will be used against them at sentencing"); United States v. Davis, 36 F.3d 1424, 1429 (9th Cir. 1994) (noting that the Ninth Circuit had initially filed an opinion in the case finding § 851(e) unconstitutional on the ground that its five-year prohibition affected fundamental rights and was not justified by a compelling governmental interest); *see also* Olivia W. Karlin, *The Ninth Circuit: If in Doubt, Favor the Defendant*, 6 FED. SENT'G REP. 253, 255 (1994) (tracing the history of the Ninth Circuit's treatment of the right to collaterally attack prior convictions used in federal sentencing and predicting the effect of *Custis* on Ninth Circuit law).

[50] *Custis*, 511 U.S. at 496.

[51] *Id.*

[52] *Id.* at 497. The Court also noted that the fact that the defendant-petitioner had pled guilty to the convictions he challenged weighed against him because the finality of such convictions is of special importance. *Id.*

scenario where this argument would be granted certiorari by the Supreme Court,[53] *Custis* itself seems to cast doubt on the question of whether such an argument would ever be successful. Of the many constitutional candidates that might warrant an additional constitutional foundation for a collateral attack,[54] ineffective assistance of counsel is particularly analogous to the "jurisdictional" nature of a *Gideon* defect, as is arguably stated by the Court's own precedent.[55]

However, such was the very constitutional claim rejected in *Custis* and taken up in Justice Souter's dissenting opinion.[56] If any constitutional rule of criminal procedure was to rise to the level of *Gideon* in the context of collateral attacks on prior convictions, it seems that the very defect the Court outright rejected as a foundation for such a right in *Custis*—*Strickland*'s right to effective assistance of counsel—would have been the most suitable candidate. Therefore, as the remainder of this paper will argue, the clearest path to broadening the scope of criminal defendants' right to collaterally attack prior convictions used as the basis for § 851 enhancements is not through constitutional litigation, but rather through legislative reform (or abolition) of § 851(e).

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[53] *See* Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 937–39 (noting that conflict amongst courts, such as a federal circuit split, may be the "single most significant input to the Court's decision whether to grant review"). Because there is no federal circuit split on the issue of the constitutional right to collaterally attack prior convictions used in federal sentencing enhancements post-*Custis*, it seems unlikely that such a case would be granted certiorari in the Court's limited docket space. *See also supra* Section III.A.

[54] *See* Daniels v. United States, 532 U.S. 374, 391 (2001) (Souter, J., dissenting) ("The need to address *Gideon* is no reason to ignore *Moore v. Dempsey* . . . *Strickland v. Washington* . . . *Miranda v. Arizona* . . . *Brady v. Maryland* . . . or any other recognized violations of the Constitution.").

[55] *See Custis*, 511 U.S. at 509 (Souter, J., dissenting) ("[I]f being denied appointed counsel is a 'jurisdictional defect,' why not being denied effective counsel (treated as an equivalent in *Strickland*)?"); Strickland v. Washington, 466 U.S. 668, 685 (1984) (noting that the Court has "recognized that 'the right to counsel is the right to the effective assistance of counsel'" (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970))).

[56] *Custis*, 511 U.S. at 509.

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June 11, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
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Dear Judge Walker:

I am a 2022 graduate of New York University School of Law, where I was recognized as a McKay Scholar (for being in the top twenty-five percent of students after four semesters) and graduated cum laude. I am currently a first year associate at Stroock & Stroock & Lavan LLP. I am writing to apply for a clerkship in your chambers for the 2024-2025 Term.

Enclosed for your review are my resume, law school transcript, undergraduate transcript, and two writing samples. One sample is a reply memorandum of law, of which I wrote three sections, filed in *Martinez v. City of New York*, Index No. 152989/2023, (Sup. Ct. N.Y. Cnty. May 10, 2023). The other is a hypothetical petition for a writ of certiorari I wrote for a course I took in Spring 2021, Constitutional Litigation. Arriving under separate cover are letters of recommendation from the following people:

- Professor Bethany Davis-Noll, bethany.davisnoll@nyu.edu, (212) 998-6239
- Professor Michael Bosworth, msb391@nyu.edu, (917) 596-3153
- Associate Landon Reid, lreid@stroock.com, (212) 806-1225

Please feel free to contact me should you need any additional information. Thank you for your consideration.

Respectfully,

Samantha Mehring

Enclosures

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Graduate Lawyering Program, Teaching Assistant (Fall 2021)
Global Justice Clinic, Student Advocate (Fall 2020-Spring 2021)

**COLLEGE OF WILLIAM & MARY**, Williamsburg, VA
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**STROOCK & STROOCK & LAVAN LLP**, New York, NY
***Associate***, October 2022-present
Research legal issues related to labor law, breach of contract, election law, FOIA requests, and will contests. Assist in drafting motions and briefs. Represent class members in a class action lawsuit.

***Summer Associate,*** Summer 2021
Researched associational discrimination, breach of contract, and labor law issues. Assisted in drafting memoranda, preparing for depositions, and writing articles for publication.

**CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE**, New York, NY
***Legal Intern,*** Summer 2020
Conducted legal research on the intersection of government policy with the privatization of key sectors and drafted memoranda summarizing findings. Monitored ongoing litigation for relevant priorities and projects.

**AIDDATA RESEARCH LAB**, Williamsburg, VA
***Research Assistant,*** February 2018-January 2019
Helped develop a database that AidData uses to understand the interactions between development organizations and policy-makers on the ground. Translated and edited translations of documents between French and English.

**COLLEGE OF WILLIAM & MARY**, Williamsburg, VA
***Economics Department Teaching Assistant,*** August 2018-December 2018
Held weekly office hours to provide guidance and assistance to students taking Principles/Methods of Statistics. Held test review sessions for students to ask questions, go over lecture material, and prepare for upcoming exams.

**MULTILATERAL INVESTMENT GUARANTEE AGENCY**, Washington, DC
***Environmental and Social Intern,*** June 2018-August 2018
Conducted contextual risk and Integrated Biodiversity Assessment Tool (IBAT) analysis of assigned projects. Provided input on internal reports, memoranda, and presentations.

## ADDITIONAL INFORMATION

Enjoy long-distance running, traveling, and *The West Wing*.

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**Page:** **1 of 2**

**New York University**
**Beginning of School of Law Record**

**Degrees Awarded**

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School of Law
Honors: cum laude
Major: Law

**Fall 2019**

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Juris Doctor
Major: Law

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| Instructor: Rachel E Barkow | | | |
| Procedure | LAW-LW 11650 | 5.0 | B+ |
| Instructor: Burt Neuborne | | | |
| Contracts | LAW-LW 11672 | 4.0 | B |
| Instructor: Clayton P Gillette | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
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| Cumulative | 15.5 | 15.5 |

**Spring 2020**

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Juris Doctor
Major: Law

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| Instructor: Kenji Yoshino | | | |
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Anna Arons | | | |
| Legislation and the Regulatory State | LAW-LW 10925 | 4.0 | CR |
| Instructor: Emma M Kaufman | | | |
| Torts | LAW-LW 11275 | 4.0 | CR |
| Instructor: Barry E Adler | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Topic: Social Movement Lawyering | | | |
| Instructor: Deborah L Axt | | | |
| Sarah E Burns | | | |
| Andrew David Friedman | | | |
| Financial Concepts for Lawyers | LAW-LW 12722 | 0.0 | CR |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.5 | 14.5 |
| Cumulative | 30.0 | 30.0 |

**Fall 2020**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Global Justice Clinic | LAW-LW 10679 | 3.0 | A- |
| Instructor: Margaret Lockwood Satterthwaite | | | |
| Elizabeth Happel | | | |
| Global Justice Clinic Seminar | LAW-LW 11210 | 4.0 | A- |
| Instructor: Margaret Lockwood Satterthwaite | | | |
| Elizabeth Happel | | | |
| Professional Responsibility and the Regulation of Lawyers | LAW-LW 11479 | 2.0 | B |
| Instructor: William E Nelson | | | |
| Evidence | LAW-LW 11607 | 4.0 | A |
| Instructor: Daniel J Capra | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 13.0 | 13.0 |
| Cumulative | 43.0 | 43.0 |

**Spring 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Complex Litigation | LAW-LW 10058 | 4.0 | A- |
| Instructor: Samuel Issacharoff | | | |
| Arthur R Miller | | | |
| Constitutional Litigation Seminar | LAW-LW 10202 | 2.0 | A |
| Instructor: John G Koeltl | | | |
| Global Justice Clinic | LAW-LW 10679 | 3.0 | A |
| Instructor: Margaret Lockwood Satterthwaite | | | |
| Elizabeth Happel | | | |
| Global Justice Clinic Seminar | LAW-LW 11210 | 3.0 | A |
| Instructor: Margaret Lockwood Satterthwaite | | | |
| Elizabeth Happel | | | |
| The Executive and Criminal Justice Reform Seminar | LAW-LW 12581 | 2.0 | A |
| Instructor: Michael S Bosworth | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.0 | 14.0 |
| Cumulative | 57.0 | 57.0 |

McKay Scholar-top 25% of students in the class after four semesters

**Fall 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Criminal Procedure: Fourth and Fifth Amendments | LAW-LW 10395 | 4.0 | A |
| Instructor: Andrew Weissmann | | | |
| Corporations | LAW-LW 10644 | 4.0 | A |
| Instructor: Ryan J Bubb | | | |
| Orison S. Marden Moot Court Competition | LAW-LW 11554 | 1.0 | CR |
| Teaching Assistant | LAW-LW 11608 | 1.0 | CR |
| Instructor: Alice Estill Burke | | | |
| Labor and Employment Law Seminar | LAW-LW 11681 | 2.0 | A |
| Instructor: Samuel Estreicher | | | |
| Racial Justice and the Law | LAW-LW 12241 | 2.0 | CR |
| Instructor: Bryan A Stevenson | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.0 | 14.0 |
| Cumulative | 71.0 | 71.0 |

**Spring 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Government Lawyering at the State Level Seminar | LAW-LW 11303 | 2.0 | A |
| Instructor: Bethany Davis Noll | | | |
| Journal of Law and Business | LAW-LW 11317 | 1.0 | CR |
| Orison S. Marden Moot Court Competition | LAW-LW 11554 | 1.0 | CR |
| Federal Courts and the Federal System | LAW-LW 11722 | 4.0 | A- |
| Instructor: Helen Hershkoff | | | |
| Property | LAW-LW 11783 | 4.0 | B+ |

| | |
|---|---|
| **Name:** | **Samantha B Mehring** |
| **Print Date:** | **05/08/2023** |
| **Student ID:** | **N10691352** |
| **Institution ID:** | **002785** |
| **Page:** | **2 of 2** |

Instructor: Frank K Upham

| | AHRS | EHRS |
|---|---|---|
| Current | 12.0 | 12.0 |
| Cumulative | 83.0 | 83.0 |

Staff Editor - Journal of Law & Business 2020-2021
Article Editor - Journal of Law & Business 2021-2022

**End of School of Law Record**

# *The College of William and Mary* -- Web Transcript

930945017 Samantha B. Mehring
Dec 26,2019 12:37 pm

This is a Web self-service transcript for student use. Courses which are in progress may also be included on this transcript.

Transfer Credit Institution Credit Transcript Totals

***Transcript Data***

**STUDENT INFORMATION**

**Name :** Samantha B. Mehring

**Curriculum Information**

**Current Program**
Bachelor of Arts

**College:** Faculty of Arts and Sciences

**Major and Department:** International Relations, International Relations

**Minor:** Economics

***Transcript type:WEB is NOT Official ***

**DEGREES AWARDED**

**Conferred:** Bachelor of Arts **Degree Date:** May 11,2019

**Institutional Honors:** Summa Cum Laude

**Curriculum Information**

**Primary Degree**

**College:** Faculty of Arts and Sciences

**Major:** International Relations

**Minor:** Economics

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Institution:** | 100.000 | 100.000 | 100.000 | 100.000 | 390.10 | 3.90 |
| **Transfer:** | 0.000 | 0.000 | 27.000 | 0.000 | 0.00 | 0.00 |
| **Degree:** | 100.000 | 100.000 | 127.000 | 100.000 | 390.10 | 3.90 |

## TRANSFER CREDIT ACCEPTED BY INSTITUTION -Top-

**Fall 2016:** Advanced Placement Credit

| Subject | Course | Title | Grade | Credit Hours | Quality Points | R |
|---|---|---|---|---|---|---|
| ENGL | 1XX | Transfer Elective Credit | T | 3.000 | 0.00 | |
| FREN | 206 | Upper Intermediate Conversatn | T | 3.000 | 0.00 | |
| GOVT | 201 | Intro to American Politics | T | 3.000 | 0.00 | |
| HIST | 121 | American History to 1877 | T | 3.000 | 0.00 | |
| HIST | 122 | American History since 1877 | T | 3.000 | 0.00 | |
| HIST | 191 | Global History | T | 3.000 | 0.00 | |
| HIST | 192 | Global History | T | 3.000 | 0.00 | |
| LATN | 102 | Elementary Latin | T | 0.000 | 0.00 | |
| MATH | 106 | Elem Probability/Statistics | T | 3.000 | 0.00 | |
| WRIT | 101 | Writing | T | 3.000 | 0.00 | |

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Current Term:** | 0.000 | 0.000 | 27.000 | 0.000 | 0.00 | 0.00 |

Unofficial Transcript

## INSTITUTION CREDIT -Top-

**Term: Fall 2016**

**Additional Standing:** Dean's List

| Subject | Course | Level | Title | Grade | Credit Hours | Quality Points | R |
|---|---|---|---|---|---|---|---|
| ECON | 101 | UG | Principles: Microeconomics | A- | 3.000 | 11.10 | |
| FREN | 212 | UG | Cross-Cultural Perspectives | B+ | 3.000 | 9.90 | |
| GOVT | 204 | UG | Intro International Politics | A | 3.000 | 12.00 | |
| HISP | 103 | UG | Combined Beginning Spanish | A | 4.000 | 16.00 | |
| HIST | 100 | UG | Apartheid - Then and Now | A | 4.000 | 16.00 | |

### Term Totals (Undergraduate)

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Current Term:** | 17.000 | 17.000 | 17.000 | 17.000 | 65.00 | 3.82 |

| | | | | | | |
|---|---|---|---|---|---|---|
| **Cumulative:** | 17.000 | 17.000 | 17.000 | 17.000 | 65.00 | 3.82 |

Unofficial Transcript

**Term: Spring 2017**

**Additional Standing:** Dean's List

| Subject | Course | Level | Title | Grade | Credit Hours | Quality Points | R |
|---|---|---|---|---|---|---|---|
| ARTH | 330 | UG | Surrealism to High Modernism | A- | 3.000 | 11.10 | |
| ECON | 102 | UG | Principles: Macroeconomics | A | 3.000 | 12.00 | |
| FREN | 210 | UG | From Word to Text | A | 3.000 | 12.00 | |
| GOVT | 150 | UG | Politics & Policy Intl Develop | A- | 4.000 | 14.80 | |
| HISP | 203 | UG | Combined Intermediate Spanish | A | 4.000 | 16.00 | |

**Term Totals (Undergraduate)**

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Current Term:** | 17.000 | 17.000 | 17.000 | 17.000 | 65.90 | 3.87 |
| **Cumulative:** | 34.000 | 34.000 | 34.000 | 34.000 | 130.90 | 3.85 |

Unofficial Transcript

**Term: Fall 2017**

**Additional Standing:** Dean's List

| Subject | Course | Level | Title | Grade | Credit Hours | Quality Points | R |
|---|---|---|---|---|---|---|---|
| ECON | 303 | UG | Intermediate Microecon Theory | A | 3.000 | 12.00 | |
| FREN | 305 | UG | The Craft of Writing | A | 3.000 | 12.00 | |
| GOVT | 328 | UG | International Political Econ | A | 3.000 | 12.00 | |
| HISP | 207 | UG | Cross-Cultural Perspectives | A | 3.000 | 12.00 | |
| INRL | 300 | UG | Intl Rel Disciplinary Persp | A- | 4.000 | 14.80 | |

**Term Totals (Undergraduate)**

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Current Term:** | 16.000 | 16.000 | 16.000 | 16.000 | 62.80 | 3.92 |
| **Cumulative:** | 50.000 | 50.000 | 50.000 | 50.000 | 193.70 | 3.87 |

Unofficial Transcript

**Term: Spring 2018**

**Additional Standing:** Dean's List

| Subject | Course | Level | Title | Grade | Credit Hours | Quality Points | R |
|---|---|---|---|---|---|---|---|
| ECON | 304 | UG | Intermediate Macroecon Theory | A | 3.000 | 12.00 | |
| ECON | 307 | UG | Principles/ Methods Statistics | A | 3.000 | 12.00 | |
| ENGL | 371 | UG | Writing Paterson | A | 3.000 | 12.00 | |
| GOVT | 329 | UG | International Security | A- | 3.000 | 11.10 | |
| KINE | 290 | UG | Introduction to Global Health | A | 3.000 | 12.00 | |

**Term Totals (Undergraduate)**

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Current Term:** | 15.000 | 15.000 | 15.000 | 15.000 | 59.10 | 3.94 |
| **Cumulative:** | 65.000 | 65.000 | 65.000 | 65.000 | 252.80 | 3.88 |

Unofficial Transcript

**Term: Fall 2018**

**Additional Standing:** Dean's List

| Subject | Course | Level | Title | Grade | Credit Hours | Quality Points | R |
|---|---|---|---|---|---|---|---|
| ECON | 475 | UG | International Trade Theory | A- | 3.000 | 11.10 | |
| GOVT | 326 | UG | International Law | A | 3.000 | 12.00 | |
| HIST | 311 | UG | Social Justice | A | 3.000 | 12.00 | |
| INRL | 390 | UG | Foreign Policy Intl Dev & Secu | A- | 3.000 | 11.10 | |
| KINE | 280 | UG | Intro to Public Health | A | 3.000 | 12.00 | |
| SOCL | 313 | UG | Globalization & Intl Developmt | A | 3.000 | 12.00 | |

**Term Totals (Undergraduate)**

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Current Term:** | 18.000 | 18.000 | 18.000 | 18.000 | 70.20 | 3.90 |
| **Cumulative:** | 83.000 | 83.000 | 83.000 | 83.000 | 323.00 | 3.89 |

Unofficial Transcript

**Term: Spring 2019**

**Additional Standing:** Dean's List

| Subject | Course Level | | Title | Grade | Credit Hours | Quality Points | R |
|---|---|---|---|---|---|---|---|
| ECON | 451 | UG | Labor Market Analysis | A | 3.000 | 12.00 | |
| GOVT | 334 | UG | Russian & Post-Soviet Politics | A- | 3.000 | 11.10 | |
| GOVT | 403 | UG | Arab Spring & Consequences | A | 4.000 | 16.00 | |
| GSWS | 332 | UG | Sex & Race in Plays & Films | A | 4.000 | 16.00 | |
| KINE | 352 | UG | Nutrition and the Brain | A | 3.000 | 12.00 | |

**Term Totals (Undergraduate)**

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Current Term:** | 17.000 | 17.000 | 17.000 | 17.000 | 67.10 | 3.94 |
| **Cumulative:** | 100.000 | 100.000 | 100.000 | 100.000 | 390.10 | 3.90 |

Unofficial Transcript

**TRANSCRIPT TOTALS (UNDERGRADUATE)** **-Top-**

| | Attempt Hours | Passed Hours | Earned Hours | GPA Hours | Quality Points | GPA |
|---|---|---|---|---|---|---|
| **Total Institution:** | 100.000 | 100.000 | 100.000 | 100.000 | 390.10 | 3.90 |
| **Total Transfer:** | 0.000 | 0.000 | 27.000 | 0.000 | 0.00 | 0.00 |
| **Overall:** | 100.000 | 100.000 | 127.000 | 100.000 | 390.10 | 3.90 |

Unofficial Transcript

**RELEASE: 8.7.1**

State Energy &
Environmental Impact Center
NYU School of Law

June 16, 2023

**RE: Samantha Mehring, NYU Law '22**

Your Honor:

I am the Executive Director of the State Energy & Environmental Impact Center and an Adjunct Professor at NYU School of Law. I am writing to recommend Samantha Mehring for a clerkship in your chambers. After working with and teaching her, I can tell you without a doubt that she would be an excellent clerk and I highly recommend her.

I first met Samantha when she took my course in the spring of 2022. I teach a class at NYU School of Law on government lawyering. In the class, we focus on the role of attorneys general (AGs) in defending and advocating for policy at the state and federal levels. Sam's participation in class was quite wonderful. She was respectful and asked good questions. Each student had to present on several different topics and Sam's presentations were professional and easy to follow. I also loved her paper. She took on a standard critique of many state AG settlements and completely undid it. I was impressed! Her writing was well-researched and clear as well, which made it that much more pleasant to read.

During the semester, I also recruited Sam to work as a research assistant for me. She helped me write a section of a paper that is about a role of state attorneys general in a just transition. It was a challenging project, because states face strict preemption for a lot of labor-related policy. But Sam did an excellent job harnessing the readings from our class as well as other research to pull together a list of factors that make it more or less likely for an attorney general to decide to get involved in an issue. She also used her background in labor law to guide me, which I really appreciated. We then used those factors to analyze a role for AGs in protecting workers in the growing clean energy sector. Last but not least, thanks to her discipline and organization we got through the project in an efficient manner during the semester—and I did not have to worry about interfering with finals at the end of the semester. It was a joy to work with her both because of that and because of her substantive contributions. A copy of the paper she helped with can be found here: https://digitalcommons.pace.edu/pelr/vol40/iss1/7/.

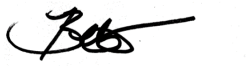
I clerked twice and based on that experience I think that Sam is well prepared for a clerkship and that she will be an asset to your chambers should you decide to hire her! She is self-directed and trustworthy. Her grades are quite good, demonstrating that she is a hard

The State Energy & Environmental Impact Center
New York University School of Law • Wilf Hall, 139 MacDougal St., 1st Fl. • New York, NY 10012
stateimpactcenter@nyu.edu

worker who can communicate and who is good at issue spotting and everything else we teach in law school. I can also tell you that she is respectful and will be a very good colleague to her peers.

I am very happy to answer any questions about Sam. I can be reached at 646-612-3458; bethany.davisnoll@nyu.edu.

All my best,



Bethany Davis Noll

Writing Sample
Samantha Mehring

I wrote sections I, III, and V of the below excerpted reply memorandum of law, filed in *Martinez v. City of New York*, Index No. 152989/2023, (Sup. Ct. N.Y. Cnty. May 10, 2023). As an associate at Stroock & Stroock & Lavan LLP, I helped represent six New York City voters against the City of New York in this lawsuit. We challenged the constitutionality of Local Law #15, a law passed by the City Council of New York that bars residents from voting for candidates who have been convicted of certain public corruption crimes. We challenged the law based on its violation of the First Amendment right of association, preemption, and its violation of the Municipal Home Rule Law and New York City Charter. The City of New York argued that Plaintiffs lacked standing to bring this lawsuit, that this lawsuit was barred by laches, and that Local Law #15 was otherwise constitutional. I have included below the sections of the reply memorandum of law that I wrote: the sections addressing standing (section I), Local Law #15's violation of the First Amendment right of association (section III), and Local Law #15's violation of the Municipal Home Rule Law and New York City Charter (section V). I received permission from the firm to use this reply memorandum of law as a writing sample. Attorneys at Stroock & Stroock & Lavan lightly edited my writing in these sections.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

| | |
|---|---|
| ILEANA MARTINEZ, CARMEN BOBADILLA, YVETTE C. JETER, MINISTER SHERMAN TERRY LEWIS, RAFELINA MORENO, and FRANCISCO ROSADO, | Index No. 152989/2023 |
| Plaintiffs, | Moton Seq. No. 1 |
| -against- | |
| THE CITY OF NEW YORK, | |
| Defendant. | |

**PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR DECLARATORY RELIEF PURSUANT TO CPLR § 3211(C)**

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038-4892
(212) 806-5400

*Attorneys for Plaintiffs*

Of Counsel:

Jerry H. Goldfeder
David J. Kahne
Michael G. Mallon
Elizabeth C. Milburn
Samantha Mehring

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**Statutes**



**Other Authorities**

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## PRELIMINARY STATEMENT

The issue before the Court is straightforward. Local Law #15 is unconstitutional, preempted by New York State law, and unlawful for not having been enacted through a voter referendum. There are no factual disputes. As such, because the City has explicitly urged this Court to adopt its cross-motion to dismiss, the Court has the authority to treat the parties' respective arguments as requests for summary judgment pursuant CPLR § 3211(c), and, respectfully, that is exactly what this Court should do.

The City resists having this Court reach the merits on the invalidity of Local Law #15, raising arguments, as so many defenders of invalid statutes do, that Plaintiffs lack standing to question the law or that they should have brought this case two years ago (when the City would no doubt have argued there was no injury yet).

Of course, voters have every right to attack a statute that deprives them of their ability to associate with each other and their preferred candidate as an election approaches. Constitutional jurisprudence is unambiguously clear on this point.

The City would have this Court believe that Plaintiffs cannot bring this case now, although this is the precise time when Local Law #15 directly impacts their right to vote. Plaintiffs could not have brought it before they sought to place their preferred candidate on the ballot – any time before now would have rendered such an action premature. This action is ripe only now. Plaintiffs are directly impacted and they have standing to sue.

## ARGUMENT

### I. PLAINTIFFS HAVE STANDING IN THIS ACTION

The City's argument that Plaintiffs lack standing to challenge Local Law #15 is wrong. These voters plainly have standing to redress the deprivations of their rights.

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First, the City intentionally misconstrues this action. It asserts that "[t]o the extent that Plaintiffs claim a right to litigate the validity – directly or indirectly – of a designating petition, they are wrong" because voters do not have standing to bring Election Law Article 16 proceedings seeking to validate or invalidate designating petitions. Def.'s Mem. 4.[1] This is a bogus argument. As the City is well aware, this action was not brought as an Article 16 proceeding. Respectfully, the Court should not be distracted by the City's straw-man claim.

Rather, Plaintiffs' case is brought as a plenary action, which they have every right to bring, challenging a law that, if implemented, will have a direct and irreparable impact on them—it will prevent them from voting for their preferred candidate.

The United States Supreme Court, in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and its progeny, articulated the constitutional jurisprudence on behalf of voters challenging a statute that improperly prevented them from voting for the candidate of their choice. There, voters in Ohio were stymied from voting for a candidate because that candidate failed to file nominating petitions by a specific date. And even though the candidate was also directly impacted, it was the voters whose rights were addressed by the Court and ultimately sustained by the invalidation of the statute (which, it should be added, had been enacted years before). *See also Kusper v. Pontikes,* 414 U.S. 51 (1973) (voter had standing to challenge years-old statute preventing her from voting in a primary because she voted in another party's primary during the previous 23 months).

The criterion required to establish standing is clear, and Plaintiffs easily meet it. Plaintiffs can maintain an action when they have suffered an injury due to the challenged statute. *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 772–73, 774 (1991). It is

[1] References to the City's Memorandum of Law in Opposition, ECF Doc. # 30, are noted as "Def.'s Mem. XX"

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unambiguous that Plaintiffs here are harmed, irreparably, by Local Law #15 because the law indisputably prevents them from voting for a specific candidate. As such, the Plaintiffs are in the same position as those in *Anderson, Kusper,* and a legion of cases in which voters can sue to invalidate a statute that impairs their ability to cast a ballot.[2]

Indeed, New York State and federal courts routinely find standing where voters seek to redress deprivations of constitutional rights, preemption, and referendum-related claims. *See, e.g., Yang v. Kellner*, 458 F. Supp. 3d 199, 202 (S.D.N.Y. 2020), *aff'd sub nom. Yang v. Kosinski*, 805 F. App'x 63 (2d Cir. 2020), and *aff'd sub nom. Yang v. Kosinski*, 960 F.3d 119 (2d Cir. 2020); Decision & Order, *Fossella v. Adams*, Index No. 85007/2022, ECF Doc. # 174 (Sup. Ct. Richmond Cnty. June 27, 2022).[3] It is telling that the City instead relies upon the irrelevant argument that voters cannot bring a case under Election Law Article 16, when the instant case is obviously not that. There is no legitimate argument to support a challenge to Plaintiffs' standing in this action.

## II. THE DOCTRINE OF LACHES DOES NOT APPLY

Next, the City's allegation that "laches" prevents this Court from reaching the merits has no basis, and is another attempt to persuade the Court to avoid the merits.

At its core, laches is an equitable defense that can only be "asserted where neglect in promptly asserting a claim for relief results in prejudice to a defendant…." *Stancioff v. Estate of Danielson*, No. 162883/2015, 2018 WL 6930264, at *5 (Sup. Ct. N.Y. Cnty. Dec. 31, 2018). The City has not shown any prejudice whatsoever. If this Court determines that Local Law #15

[2] *See, e.g., Munro v. Socialist Workers Party,* 479 U.S. 189 (1986); *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208 (1986).

[3] *See also Price v. New York State Bd. of Elections*, 540 F.3d 101, 104 (2d Cir. 2008); *Saratoga Cnty. Chamber of Com. v. Pataki*, 275 A.D.2d 145, 156 (3d Dep't 2000); *Phelan v. City of Buffalo*, 54 A.D.2d 262 (4th Dep't 1976).

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rationales and excuses. Raising the equitable doctrine of laches with such unclean hands is not countenanced by courts, and, respectfully, should not be countenanced here.

In short, the laches argument has no merit and should not prevent this Court from reaching the merits and invalidating Local Law #15.

## III. LOCAL LAW #15 VIOLATES PLAINTIFFS' FIRST AMENDMENT ASSOCIATIONAL RIGHTS

Plaintiffs' First Amendment right of association is infringed because Local Law #15 prevents them from associating with each other and their preferred candidate. Indeed, it does so without articulating a compelling state interest.

The City first argues that Plaintiffs have no rights concerning the structure and organization of state and local government. This is a red herring—Plaintiffs do not claim such rights, nor are Plaintiffs' arguments reliant on such rights. The City then argues that Local Law #15 does not violate Plaintiffs' associational rights because candidates, not voters, are injured by Local Law #15. Pointing to *Rosenstock v. Scaringe*, the City argues, "the direct impact of [a law limiting eligibility to hold public office] is not on one's right to vote, but on an individual's right to hold public office…." Def.'s Mem. 10 (quoting 40 N.Y.2d 563, 564 (1976)). A page later, however, the City acknowledges that "[b]ecause 'the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.'" Def.'s Mem. 11 (quoting *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972)). *See also Price*, 540 F.3d at 107–08 (2d Cir. 2008) (where (as here) a law governs selection and eligibility of a candidate, it "inevitably affects … the individual's right to vote and his right to associate with others for political ends.") (citation omitted).

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The City next asserts that individuals "do not have a protected interest in being elected to or holding public office…."[5] Def's Mem. 11. This is another red herring: Plaintiffs are asserting their rights *as voters* to associate with the candidate of their choice. Plaintiffs do not assert the right to be a candidate.

In a final effort, the City asserts that "such qualification laws are routinely upheld." Def.'s Mem. 11. The City is wrong. The City relies on *Clements v. Fashing* for the proposition that "[c]lassifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." 457 U.S. at 963. However, in the next sentence of *Clements*, the U.S. Supreme Court states that such leniency is not accorded "when the challenged statute places burdens upon […] a constitutional right that is deemed to be 'fundamental.'" *Id.* (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)). The City cannot seriously challenge the fundamental nature of the right of association or the right to vote under the federal and state constitutions. *See, e.g., Tashjian*, 479 U.S. at 217 ("The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote … or, as here, the freedom of political association.") (internal citation omitted). Given that courts uniformly recognize the right to associate as a fundamental right, the City's assertion that Local Law #15 should be "set aside only if [it is] based solely on reasons totally unrelated to the pursuit

[5] Omitting that strict scrutiny applies when an "identifiable class has been disenfranchised," *Rosenstock*, 40 N.Y.2d at 564, the City baldly asserts that "[c]ourts have uniformly held that persons do not have a protected interest in being elected to or holding public office and the existence of barriers to a candidacy do not even 'compel close scrutiny.' *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Murray v. Cuomo*, 460 F. Supp. 3d 430, 443 (S.D.N.Y. 2020) ('[T]here is no freestanding 'right to be a candidate' in an election.')." Def.'s Mem. 11. The City is intentionally missing the point, or attempting to distract this Court from the central issue—that it *is the voters' rights* that are stake here and they are directly adversely impacted by the implementation of Local Law #15.

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of the State's goals and only if no grounds can be conceived to justify them," misstates the law. Def.'s Mem. 11 (quoting *Clements*, 457 U.S. at 963).

The City's reliance on decisions upholding "qualification laws" is similarly misplaced. The City relies on court decisions upholding term limits (*Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009)), laws prohibiting elected officials from retaining office while running for a different office (*Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980)), and laws imposing residency requirements (*Scavo v. Albany Cnty. Bd. of Elections*, 131 A.D.3d 796 (3d Dep't 2015); *Adamczyk v. Mohr*, 87 A.D.3d 833 (4th Dep't 2011)). Def.'s Mem. 11. However, those cases themselves distinguish laws like Local Law #15 from the laws they uphold. In *Molinari v. Bloomberg*, the Second Circuit explicitly rested its decision to uphold a term limit law on the fact that term limit laws do not "involve direct restrictions on speech or access to the ballot," unlike laws that limit the amounts candidates can spend on their campaigns, that ban primary endorsements by political parties, and other such laws. 564 F.3d at 605, 604 n.10. In *Signorelli v. Evans*, the Second Circuit upheld a law prohibiting state court judges from running for other elected office because through such a law, "New York places no obstacle between Signorelli and the ballot or his nomination or his election. He is free to run and the people are free to choose him." 637 F.2d at 858. There was no infringement on the right to associate, because if *Signorelli* resigned his state court judgeship, he could run for any elected position he was otherwise qualified for.

Local Law #15 is fundamentally different from these laws. It permanently bans individuals from *ever* running for certain elected positions if they have *ever* been convicted of certain felonies, regardless of any other qualifications. This is the type of "direct restriction[ ] on

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… access to the ballot" that *Molinari v. Bloomberg* recognizes as violating the fundamental right of voters to associate with their chosen candidate. 564 F.3d at 604-5.

The only time voters' rights can be infringed is when there is clear and undeniable governmental interest that results in a narrowly-drawn, wholly defensible and internally consistent statute. Local Law #15 is nothing of the kind. It is not narrowly-drawn or internally consistent. It is retroactive; it bars persons from serving in office forever; it includes certain crimes but not others; and it completely undercuts itself by exempting individuals who have been pardoned.

Thus, despite the twists utilized by the City to deny the unambiguous constitutional jurisprudence regarding voters' First Amendment right to associate, this Court should not be misled into adopting wholly irrelevant arguments from wholly irrelevant cases.

## IV. LOCAL LAW #15 IS PREEMPTED BY STATE LAW

In addition to its unconstitutionality, Local Law #15 is preempted by both field preemption and direct conflict, and is therefore invalid.

The City's arguments against preemption are misleading, and without merit. The City first argues that "[s]ilence by the State on an issue should not be interpreted as an expression of intent by the Legislature" (internal quotes omitted)." Def.'s Mem. 13. However, the State has been anything but silent on the topic of qualifications for public office: while Public Officers Law § 3 sounds like one small, discrete statute, it is not the "slender reed" that the City makes it out to be—rather, *Public Officers Law § 3 houses over one-hundred and seventy-five (175) subsections*, each laying out qualifications and exceptions to those qualifications. The comprehensive coverage of qualifications is a clear demonstration by the State that it intends to occupy the field through an extensive set of statutes spanning from sweeping requirements to

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ejected each such proposal, thereby making an active choice not to ban such individuals from running for public office.[6] This puts Local Law #15 directly at odds with the State's intentions.

The City finally fails to address the direct conflict that arises from the fact that while the State has time limits on its disqualifications for various convictions, Local Law #15 contains none. The unending duration of Local Law #15's reach thus bans people convicted of crimes forever, explicitly prohibited by Public Officers Law § 3.

Thus, the City has utterly failed in this argument as well. Both field and conflict preemption render Local Law #15 invalid.

## V. LOCAL LAW #15 IS INVALID BECAUSE IT WAS ENACTED CONTRARY TO THE MUNICIPAL HOME RULE LAW AND NEW YORK CITY CHARTER

The Municipal Home Rule Law requires that any law that "changes the method of nominating, electing, or removing an elective officer" must be passed by a public referendum within sixty days from the law's adoption. MHRL § 23. The City attempts to distinguish Local Law #15 from this category of laws, relying on cases involving term limits. However, in the decisions upholding the term limit laws without referendum, the courts explicitly explained that term limit laws could be passed without referendum because they do not change "the method of nominating, electing, or removing an elective officer, or … the term of an elective office." *Benzow v. Cooley*, 12 A.D.2d 162, 164 (4th Dep't 1961), *aff'd*, 9 N.Y.2d 888 (1961); *Molinari v. Bloomberg*, 564 F.3d at 608-09.

As recently as last June, in *Fossella v. Adams*, Index No. 85007/2022 (Sup. Ct. Richmond Cnty. June 27, 2022), the City's non-citizen voting law was struck down (in addition to being ruled unconstitutional and preempted by state law) because no referendum was held. The non-

[6] *See* Plaintiffs' Memorandum of Law, ECF Doc. # 6 at 14, n.14, filed March 31, 2023.

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citizen voting law changed the method of nomination and election by adding to the voter rolls and thereby affecting electoral outcomes. *See also Mayor of City of Mount Vernon v. City Council of City of Mount Vernon*, 87 A.D.3d 567, 568 (2d Dep't 2011) (affirming a decision that a local law abolishing and creating local offices was invalid for lack of referendum). Adding a public office qualification similarly impacts electoral outcomes by restricting voters' abilities to associate and vote for affected candidates, and changes the method of nominating an elective officer by changing how one qualifies to be nominated, thus requiring a referendum. *See also Barzelay v. Bd. of Sup'rs of Onondaga Cnty.,* 47 Misc. 2d 1013, 1015 (Sup. Ct. Onondaga Cnty. 1965) (a "change in the boundaries of wards from which members of the County Board of Supervisors […] are elected" requires a referendum.).

## VI. CONCLUSION

For the foregoing reasons, the Court should declare Local Law #15 invalid and permanently enjoin its enforcement.

Dated: New York, New York
May 8, 2023

Respectfully submitted,

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**WORD COUNT CERTIFICATION**

I hereby certify that this Memorandum complies with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court. In determining compliance, I relied on the word count of the word-processing system used to prepare the document. The total number of the words in this Memorandum, exclusive of the caption, table of contents, table of authorities and signature block is 4,186 words.

Date: May 8, 2023
New York, New York

STROOCK & STROOCK & LAVAN LLP

*/s/ Jerry H. Goldfeder*

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Writing Sample
Samantha Mehring

I completed this hypothetical petition for a writ of certiorari for a course I took in Spring 2021, Constitutional Litigation. The petition is based on the case *United States v. Weaver*, 975 F.3d 94 (2d Cir. 2020), *vacated on reh'g en banc*, 9 F.4th 129 (2d Cir. 2021). At the time of the course, the case was pending rehearing en banc in front of the Second Circuit Court of Appeals. For the purposes of the class, we disregarded the pending rehearing and instead crafted a petition for a writ of certiorari to the Supreme Court of the United States. I did not receive any outside edits or feedback on this writing sample.

**No.**

# In the Supreme Court of the United States

UNITED STATES,

*Petitioner*,

v.

CALVIN WEAVER,

*Respondent*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The questions presented are:

1. Whether, for Fourth Amendment purposes, a search begins once there is physical contact of a person; or whether a search begins when a police officer forms the subjective intent to search an individual.
2. Whether the *Terry* weapons frisk exception to the Fourth Amendment is satisfied when there is suspicion that an individual is armed and dangerous, but there exist other possible explanations for the individual's behavior.

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## PETITION FOR A WRIT OF CERTIORARI

The United States respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 975 F.3d 94. The opinion of the district court is unreported, but can be found at _.

## JURISDICTION

The judgment of the court of appeals was entered on September 15, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

## INTRODUCTION

This case presents two important questions of Fourth Amendment law: when a search has begun within the meaning of the Fourth Amendment, and what standard must be satisfied to establish reasonable suspicion that an individual is armed and dangerous so as to fall under the *Terry* weapons frisk exception to the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1 (1968).

According to this Court's cases, a search begins within the meaning of the Fourth Amendment

upon "the mere grasping or application of physical force with lawful authority." *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (citations omitted). Additionally, this Court has held that police officers may conduct protective frisks as long as they possess a reasonable belief that a suspect may be armed and dangerous, even when the suspect's conduct is "ambiguous and susceptible of an innocent explanation." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

The Second Circuit, breaking with this Court's precedents, considered the subjective intent of Officer Jason Tom, and found that a search had begun "no later than" when he directed Calvin Weaver to assume an "in search" position, because his intention in giving those instructions was to conduct a search, even though no physical contact had yet occurred. *United States v. Weaver*, 975 F.3d 94, 101 (2d Cir. 2020). Furthermore, the Second Circuit held that even though Weaver's actions were "equally consistent with" carrying a firearm, Officer Tom did *not* have reasonable suspicion that Weaver was armed and dangerous. *Id.* at 103.

This Court's review of these questions presented is of great importance. When a search begins within the meaning of the Fourth Amendment determines the point at which a police officer must have established reasonable suspicion that a suspect is armed and dangerous, determining whether or not the search will fall into the *Terry* weapons frisk exception to the Fourth Amendment. Furthermore, determining what standard must be met to establish reasonable suspicion is essential to determining the protections and limits of the Fourth Amendment.

## STATEMENT

At dusk on February 15, 2016, Officers Tom, Qonce, and Staub of the Syracuse Police Department were patrolling a high-crime area on the west side of Syracuse. *Id.* at 97. The officers noticed Calvin Weaver walking along the street curb and, as they drove past, he "stared into [their] vehicle, continued to stare, as [they] approached, as [they] passed, and continued to stare as [they] proceeded past him." Brief for Appellee at 4, *United States v. Weaver*, 975 F.3d 94 (2d Cir. 2020) (No. 18-1697). Officer Tom categorized Weaver's stare as "suspicious" and "odd." *Id.*

The officers observed as Weaver continued to walk towards a gray sedan and "adjusted his waistband." *Id.* Officer Tom explained that the adjustment was "just a subtle tug of [Weaver's] waistband, like an upward tug motion." *Weaver*, 975 F.3d at 97. Weaver entered the gray sedan, sitting in the front passenger seat, and the car drove away. *Id.*

The officers continued to drive, and again saw the gray sedan, this time driving on Davis Street. *Id.* The driver of the gray sedan stopped at a stop sign and only then activated his right turn signal. *Id.* The driver's failure to signal before the stop sign violated New York Vehicle and Traffic Law, which requires vehicles to signal 100 feet prior to a turn. N.Y. VEH. & TRAF. LAW § 1163(b) (Consol. 2021). The gray sedan then made two quick turns in succession. *Weaver*, 975 F.3d at 97. At that point, the officers followed the vehicle, turned on their emergency lights, and pulled the sedan over to the side of the road. *Id.*

As soon as the sedan pulled over, the rear door swung open into traffic, as if the passenger in the

backseat was trying to flee the vehicle. *Id.* The passenger complied with Officers Qonce and Tom's directions to stay in the car. Brief for Appellee at 5, *Weaver*, 975 F.3d 94 (No. 18-1697). Officer Tom saw Calvin Weaver sitting in the front passenger seat, and as he approached the vehicle, he saw Weaver pushing down on his waistband area with both hands, squirming and shifting his hips as though he was pushing something down. *Weaver*, 975 F.3d at 97. In an affidavit, Officer Tom explained that "[b]ecause I observed Weaver moving his hands around his waist and pelvis while shifting his hips, I believed he may have been in possession of a weapon." Brief for Appellee at 16, *Weaver*, 975 F.3d 94 (No. 18-1697).

Weaver showed Officer Tom his hands and put his hands on his head in compliance with the officer's instructions, exclaiming, "I don't got nothin'." *Weaver*, 975 F.3d at 97. Weaver then followed Officer Tom's instructions to get out of the car, put his hands on the trunk, and spread his legs apart. *Id.* at 98. However, Weaver was standing very close to the trunk of the car, so Officer Tom asked him to step back. *Id.* Weaver took a small step away from the trunk. *Id.*

As soon as Officer Tom began to pat Weaver's waistband area, Weaver "immediately" stepped forward and pressed his waist against the trunk, preventing Officer Tom from frisking Weaver's waist area. *Id.* Again, Officer Tom asked Weaver to take a step back, and Weaver did so, while remarking that it was slippery. *Id.* Officer Tom then placed Weaver the distance away from the car he needed to be so that Officer Tom could conduct the pat frisk. *Id.* Officer Tom started to pat frisk Weaver again, and

again Weaver pushed his waist area against the trunk. *Id.*

At that point, Officer Tom handcuffed Weaver so that he could effectively pat frisk his waist and front pockets. *Id.* Officer Tom felt a "slight small bulge" in Weaver's pocket, which he correctly predicted to be a narcotic – he retrieved baggies filled with a white powdery substance that field tested as cocaine. Brief for Appellee at 8, *Weaver*, 975 F.3d 94 (No. 18-1697).

Officer Tom continued his pat frisk, and felt "something hard," which he again correctly predicted – this time, to be a barrel of a firearm. *Weaver*, 975 F.3d at 98. Officer Qonce finished conducting the pat frisk, and, also feeling the barrel of the firearm, he unzipped Weaver's pants and the button of his long johns to remove a loaded semi-automatic pistol. *Id.*

On August 31, 2017, Calvin Weaver was charged with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 992(g)(1), one count of possession of a firearm with a removed serial number in violation of 18 U.S.C. § 922(k), and one count of simple possession of a controlled substance in violation of 21 U.S.C. § 844(a). *Id.*

Weaver moved to suppress the pistol as the fruit of an unconstitutional search, asserting that the officers did not have reasonable suspicion to pat frisk him during the traffic stop. *Id.* The district court denied Weaver's suppression motion, holding that the officers had reasonable suspicion to conduct a pat-down frisk. *Id.*

In a split-panel decision, the Second Circuit reversed the district court's denial of Weaver's motion to suppress, holding that Officer Tom lacked reasonable suspicion that Weaver was armed and

dangerous. *Id.* at 96-97. The majority ruled that the search began "no later than the moment when Officer Tom directed Weaver to assume [the] 'in search' position." *Id.* at 101. Accordingly, the majority reasoned that "[i]t is at that point that Officer Tom must have had an articulable and objectively reasonable belief that Weaver had something dangerous." *Id*. Considering the actions that occurred before that point, namely Weaver's staring at the unmarked police car, his adjustment of his waistband while walking, his statement "I don't got nothin'," and his pushing down on his waistband area with both hands while squirming and shifting his hips, the majority concluded that this was not enough to establish reasonable suspicion. *Id.* at 102-03. The majority did not consider in its decision the facts that the traffic stop took place in a high-crime area and that the vehicle's rear door opened up into traffic as soon as it pulled over, claiming that such bases of reasonable suspicion were "meritless." *Id.* at 105 & n.10.

The majority held that Weaver's actions did not establish reasonable suspicion that he was armed and dangerous because his "actions were equally consistent with the act of secreting drugs or other nonhazardous contraband," and "we cannot say that an objectively reasonable officer who witnessed such an action would conclude that Weaver carried a firearm." *Id*. at 103.

## REASONS FOR GRANTING THIS PETITION

### A. The decision below directly conflicts with the rulings of other Circuits

The decision below departs from several other circuits in its determinations of when a search begins

within the meaning of the Fourth Amendment and when a *Terry* weapons frisk exception to the Fourth Amendment is satisfied.

The Tenth, Fourth, and Seventh Circuits hold that a search does not commence upon a police officer's orders made in preparation of a frisk, but instead when the officer comes into physical contact with the individual. The Second Circuit held differently in the case below, announcing that a search begins as soon as an officer issues a command with the purpose of undertaking a search.

The Third, Fourth, Seventh, Eighth, Tenth, Eleventh, and D.C. Courts of Appeals hold that the existence of other plausible explanations for an individual's behavior does not mean that an officer cannot have reasonable suspicion that the individual is armed and dangerous, satisfying the *Terry* weapons frisk exception to the Fourth Amendment. The Second Circuit, in contrast, held in the case below that "conduct consistent with, or possibly suggestive of, weapon possession [does not] satisf[y] the reasonable-suspicion standard." *Weaver*, 975 F.3d at 106.

Because the decision below drastically departs from the other circuits' holdings in these two respects, it warrants review.

### 1. Many Circuits hold that a search begins once there is physical contact within the meaning of the Fourth Amendment

In conflict with the decision below, the Seventh Circuit has "deemed a frisk not to have begun until the officer actually placed his hands on

the defendant." *United States v. Snow*, 656 F.3d 498, 503 n.1 (7th Cir. 2011); *see also United States v. Tinnie*, 629 F.3d 749, 753 & n.3 (7th Cir. 2011). Under that standard, a search does not begin until there is physical contact between the police officer and the individual being searched, regardless of the police officer's subjective intent. The Tenth and Fourth Circuits as well as the Supreme Court of New Jersey have also adopted this objective touch-based bright-line rule. *United States v. Gurule*, 935 F.3d 878, 885-86 (10th Cir. 2019) ("[E]ven if the officers intended to frisk Gurule after he was on his feet, that does not matter for our analysis…the search did not commence until the officer physically manipulated Gurule's right-front pocket."); *United States v. Raymond*, 152 F.3d 309, 312 (4th Cir. 1998) (rejecting that the frisk of the suspect began when "officers had made the decision to pat him down"); *State v. Smith*, 134 N.J. 599, 621 (1994) ("The lack of a bright-line rule [such as 'a frisk begins when an officer lays hands on a suspect'] in stop-and frisk cases places police officers in a precarious position. Sometimes in a matter of seconds, an officer must determine whether a protective pat-down is necessary to secure his or her safety.").

There is little question that the inception of a search would be deemed the time of physical contact if this case had arisen in the Seventh, Tenth, or Fourth Circuits, or in the state courts of New Jersey. In any one of those other jurisdictions, the courts would have concluded that the search began when Officer Tom physically touched Weaver, not when Officer Tom ordered Weaver to exit the vehicle and put his hands on the trunk.

**2. At least seven Circuits hold that there is reasonable suspicion that an individual is armed and dangerous even if there are other plausible explanations for the individual's behavior**

Several circuits have interpreted this Court's precedents to mean that a police officer does not need to rule out other explanations for an individual's behavior, innocent or otherwise, in order to conclude that there is reasonable suspicion that the individual is armed and dangerous. In *United States v. Brown*, the D.C. Court of Appeals explained that "[a]s the Supreme Court has made clear, that an individual's conduct is 'ambiguous and susceptible of an innocent explanation' does not mean that it may not be grounds for suspicion: '*Terry* recognized that…officers could detain [such] individuals to resolve the ambiguity.'" *United States v. Brown*, 334 F.3d 1161, 1168 (D.C. Cir. 2003) (quoting *Wardlow*, 528 U.S. at 125-126).

The Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have also adopted that interpretation of this Court's decision in *Terry*. *See United States v. Graves*, 877 F.3d 494, 499 (3d Cir. 2017) ("Graves advances innocent explanations for all his conduct and points to other evidence undercutting the likelihood that he was engaged in criminal activity. However, the mere possibility of such an innocent explanation does not undermine Officer Simmons' determination at the time."); *United States v. McCoy*, 513 F.3d 405, 413-415 (4th Cir. 2008) (holding that a police officer had the requisite reasonable suspicion under *Terry* to detain and frisk a suspect because the officer suspected that

the individual had just conducted a drug deal); *United States v. Miranda-Sotolongo*, 827 F.3d 663, 669 (7th Cir. 2016) (citing *Wardlow*, 528 U.S. at 125) ("Reasonable suspicion…does not require the officer to rule out all innocent explanations of what he sees. The need to resolve ambiguous factual situations – ambiguous because the observed conduct could be either lawful or unlawful – is a core reason the Constitution permits investigative stops like the one at issue here."); *Chestnut v. Wallace*, 947 F.3d 1085, 1088 (8th Cir. 2020) ("To detain someone temporarily, officers need only reasonable suspicion that criminal activity is afoot based on attendant circumstances. The inquiry…need not rule out innocent conduct."); *United States v. McHugh*, 639 F.3d 1250, 1256 (10th Cir. 2011) ("[W]e need not rule out the possibility of innocent conduct, and reasonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality."); *United States v. Reed*, 402 F. App'x. 413, 416 (11th Cir. 2010) ("Even in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation…*Terry* recognized that the officers could detain the individuals to resolve the ambiguity.").

Only this Court can resolve this conflict about the standard that is required for a police officer to overcome the protections of the Fourth Amendment and search a potentially armed and dangerous individual. The decision of the court below is a marked departure from the consensus of other courts, and that departure, if allowed to stand, will profoundly curtail the ability of police officers to protect themselves in high-risk situations.

### B. The Second Circuit's rule is wrong

#### 1. The inception of a search is an objective inquiry, measured by when an officer physically contacts an individual

The court below erred in rejecting the longstanding and nearly unanimous holding of other courts that a frisk does not begin until a police officer makes physical contact with the individual for purposes of the Fourth Amendment.

This Court has defined a frisk as "a limited search of the outer clothing for weapons," *Terry*, 392 U.S. at 24, "not as a directive to put one's hands on the hood of a car." *Weaver*, 975 F.3d at 113 (Livingston, C.J., dissenting); *see also Frisk*, Black's Law Dictionary (11th ed. 2019) (defining "frisk" as "[a] pat-down search to discover a concealed weapon"). The Court's definition emphatically excludes "safety-related directives issued during the course of a lawful stop – directives involving no…physical contact." *Weaver*, 975 F.3d at 113 (Livingston, C.J., dissenting).

In *Pennsylvania v. Mimms*, this Court determined that "once a vehicle has been lawfully stopped, its driver may be ordered to get out of the car because, when assessed against the hazards faced by police in such encounters, this intrusion, far from being a frisk, *is not even a Fourth Amendment event*." *Id.* (emphasis in original) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977)).

In direct contrast with this Court's precedents, the decision below held "that Officer Tom had effectively initiated a search of Weaver when he instructed him to place his hands on the trunk with legs spread apart…because there is no other reason

in our view to ask Weaver to assume this position. A frisk is a search." *Id.* at 101 (majority opinion). That holding ignores this Court's definition of the inception of a search and is not supported by any precedent.

The court below held that the search began when Officer Tom directed Weaver to assume the "in search" position because that is when Officer Tom formed the subjective intent to search Weaver. *Id*. at 102. The majority argued that "precedent permits it to consider Officer Tom's subjective intent, despite Fourth Amendment precedent disfavoring this approach, so long as it does so only in determining *when* the [frisk] was initiated." *Id.* at 114-115 (Livingston, C.J., dissenting) (emphasis in original) (internal citations omitted). However, as the *Weaver* dissent maintains, "[t]here is no authority for this proposition…The Supreme Court…has made clear that outside a narrow range of cases not relevant here, it is simply 'unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.'" *Id.* at 115 (Livingston, C.J., dissenting) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

This Court has held that "the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment." *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); *see also Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (explaining that the Supreme Court has "repeatedly rejected" the subjective approach to determining whether the Fourth Amendment has been violated).

The decision below misconstrues the test for determining when a search begins for purposes of the

Fourth Amendment, both by characterizing a contact-less directive as the beginning of a search and by considering the police officer's subjective intent, which this Court has expressly forbidden. Because so much turns on the question of when a search begins within the meaning of the Fourth Amendment, this Court should grant review to ensure even-handed administration of the Fourth Amendment.

**2. Terry does not require a police officer to rule out other plausible explanations**

The Second Circuit's majority opinion purported to give police officers the flexibility to not rule out all other plausible explanations before concluding that there is reasonable suspicion that a suspect is armed and dangerous. However, the result that the majority reached in this case is in direct contrast with that approach. Finding that "Weaver's actions were equally consistent with the act of secreting drugs or other nonhazardous contraband [and carrying a weapon]," the court below held that there was not adequate evidence to support a reasonable suspicion that Weaver was armed and dangerous. *Weaver*, 975 F.3d at 103.

As Chief Judge Livingston explains in dissent, "*Terry*…does not limit protective frisks to circumstances in which the officer *knows* that a suspect is armed and dangerous, but permits frisks based on the reasonable belief that a suspect *may* pose such a threat, even when the suspect's conduct is 'ambiguous and susceptible of an innocent explanation.'" *Id.* at 111 (Livingston, C.J., dissenting) (emphasis in original) (citations omitted) (quoting

*Wardlow*, 528 U.S. at 125). The fact that Weaver's actions were equally consistent with carrying drugs also means that "Weaver was *just as likely* secreting a weapon or other dangerous instrument. *Id.* at 117 (Livingston, C.J., dissenting) (emphasis in original) (internal citations omitted). To hold that there was no reasonable suspicion because Weaver's actions were consistent with carrying drugs in addition to carrying a weapon destroys the reasonable suspicion standard that this Court has established. The level of suspicion required to satisfy reasonable suspicion is "considerably less than…a preponderance…and obviously less than is necessary for probable cause." *Navarette v. California*, 572 U.S. 393, 397 (2014) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). Applying this well-established standard, at least seven other courts of appeals would find that Officer Tom had reasonable suspicion to frisk Calvin Weaver for his protection and the protection of the other officers.

To ensure that police officers can comply with constitutional rules, courts can administer those rules, and citizens can be protected by them, this Court should grant review to correct the lower court's error and restore national uniformity on this important issue.

### C. The questions presented are important

Proper resolution of the questions presented is a matter of incredible importance warranting this Court's review. At what point a search begins and what standard is required to establish reasonable suspicion that a suspect is armed and dangerous are essential components to determining what the Fourth Amendment protects and what it does not.

Confusion over these questions threatens the rights of defendants as well as the ability of police officers to perform their duties when they lack clear guidance as to when the Fourth Amendment is implicated.

The disparate holdings of the Second Circuit and virtually every other circuit court on the question of when a search begins within the meaning of the Fourth Amendment "threatens to sow confusion in an area of law pursuant to which police officers must often make quick judgments in tense situations as to whether they have a lawful basis to proceed." *Weaver*, 975 F.3d at 116 (Livingston, C.J., dissenting) (citation omitted).

To allow interpretation of the Fourth Amendment to hinge on the subjective intent of police officers, as the lower court does, would be "to send police and judges into a new thicket of Fourth Amendment law," which this Court explicitly stated it was "unwilling" to do in *Arizona v. Hicks*. *Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

Furthermore, requiring that officers conclude that an individual's behavior is consistent with being armed and dangerous to the point of overcoming any other plausible explanation for the behavior is unworkable in practice and needlessly dangerous to police officers.

The Second Circuit's decision conflicts with the holdings of other courts of appeals, misapprehends this Court's precedents, and is unworkable in practice. This case presents a clear vehicle to decide two critical questions of Fourth Amendment law. This Court should grant certiorari and reverse.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SAMANTHA MEHRING
*116 Avenue C, Apt. 15*
*New York, NY 10009*
*(202) 412-9938*

APRIL 7, 2021

## Applicant Details

| | |
|---|---|
| First Name | **Yasmeen** |
| Last Name | **Metellus** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **ym2134@nyu.edu** |
| Address | **Address**<br>Street<br>**240 Mercer St**<br>City<br>**New Yorl**<br>State/Territory<br>**New York**<br>Zip<br>**10012**<br>Country<br>**United States** |
| Contact Phone Number | **9546101426** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Columbia University** |
| Date of BA/BS | **May 2020** |
| JD/LLB From | **New York University School of Law**<br>**https://www.law.nyu.edu** |
| Date of JD/LLB | **May 17, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Review of Law and Social Change** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Parker, Dennis
parker@nclej.org
212-633-6967
Sykes, Emerson
esykes@aclu.org
Sack, Emily
ejs2163@nyu.edu
401-254-4603

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Yasmeen Metellus
240 Mercer St
New York, NY, 10012
June 12th, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers for the 2024 term and any subsequent terms. I am currently a rising third-year student at New York University School of Law, where I am a Birnbaum Women's Leadership Fellow and a Notes Editor for the *Review of Law and Social Change*.

I am interested in clerking in your chambers because the experience will enable me to develop the necessary tools to advocate for marginalized communities. I am the proud child of Haitian immigrants, raised in the melting pot of South Florida. Growing up, I witnessed firsthand the hardships my family faced when my father was diagnosed with leukemia. I watched my mother endure immense financial strain as she struggled to pay for my father's medical bills. Later, as the eldest daughter in a single parent household, I supported my family by working part time throughout Columbia while also juggling extracurriculars and a rigorous academic schedule. My personal experiences have motivated me to utilize the legal system as a tool for advocating on behalf of those most impacted by inequality.

Throughout my time at NYU Law, I have sought to engage my interests in advocacy through my involvement with the Gender Violence Advocacy Project, where I was given the opportunity to help low-income women gain orders of protection. As a 1L, I served part-time as a fellow for Ignite National, a nonprofit that empowers college women to engage in local politics. In addition, I continued to research issues of inequality as a research assistant with the Center for Community Power. I plan to continue my dedication to social advocacy as an incoming research assistant for Kenji Yoshino and the Center for Diversity and Belonging and as an incoming student attorney for the Critical Race Theory Clinic.

I believe that my academic, extracurricular and personal interests will allow me to contribute meaningfully to your chambers. Enclosed I have attached my resume, law school transcript, undergraduate transcript, and writing sample. NYU Law Professors Dennis D. Parker, Emily Sack and Emerson Sykes have submitted separate letters of recommendations on my behalf. This academic year I participated in their seminars and submitted substantive legal writing for their classes.

Respectfully,

Yasmeen Metellus

**YASMEEN METELLUS**
240 Mercer S Apt. 1108 New York, NY | (954) 610 - 1426 | ym2134@nyu.edu

## EDUCATION

**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, NY
Candidate for J.D., May 2024
Honors: *Review of Law and Social Change*, Notes Editor
Birnbaum Women's Leadership Fellow—*one of 12 selected from 81 applicants*

Activities: Black Allied Law Students Association, Professional Development Chair
Mock Trial, Competitor
Teacher's Assistant for Lawyering/Legal Writing course (Fall 2022 and Spring 2023)
Incoming Teacher's Assistant for Education Law (Fall 2023)
Incoming Research Assistant for Professor Kenji Yoshino (Focused on education curricular bans)

**COLUMBIA UNIVERSITY**, New York, NY
B.A. in Political Science, May 2020
Honors: Dean's List (all semesters); Kings Crown Leadership Excellence Award; Ron Brown Scholar
Activities: Columbia University Black Pre-Professional Society, Founder

## EXPERIENCE

***DAVIS POLK***, New York, NY
***2L Diversity Summer Scholar***, May 2023-July 2023
Working primarily in Civil Litigation and White-Collar practice areas. Researching posthumous pardons for pro bono team.

***NYU CENTER FOR RACE INEQUALITY AND THE LAW***, New York, NY
***Research Assistant,*** January 2023-May 2023
Served as a research manager for a team of 8 undergraduate and masters students. Directed research relating to community power initiatives and movement lawyering. Organized meetings with activists and movement lawyers to present our findings.

***LOWENSTEIN SANDLER***, New York, NY
***1L Diversity Summer Scholar***, May 2022-July 2022
Selected as a 1L diversity scholarship recipient. Rotated through the litigation, corporate, and pro bono practice areas. Drafted memos for the litigation department. Collaborated with team members to complete a clemency application for pro bono clients. Completed research and conducted document review for pro bono resentencing cases.

***IGNITE NATIONAL***, New York, NY
***Civic Engagement Fellow***, September 2020-June 2022
Participated in a civic fellowship to empower women to run for public office. Worked part-time as a fellow throughout my first year of Accenture and first year of law school. Recruited and trained over 100 women from four university campuses across Miami and New York to join Ignite National. Collaborated with elected officials and community organizers to lobby and support legislation focused on voting rights. Hosted events with a fundraising team to attract new donations.

***ACCENTURE***, New York, NY
***Strategy Analyst***, September 2020-July 2021
Collaborated with the United Nations Global Compact to design a 6-month accelerator program for 100 + companies interested in integrating the UN's sustainable development goals into their core business practices.

**Personal:** daughter of Haitian immigrants, raised in Florida. Interests include kickboxing and coaching high school debate.

**Name:** **Yasmeen Metellus**
**Print Date:** **06/05/2023**
**Student ID:** **N14983889**
**Institution ID:** **002785**
**Page:** **1 of 1**

**New York University**
**Beginning of School of Law Record**

**Fall 2021**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Brandon Jeromy Johnson | | | |
| Torts | LAW-LW 11275 | 4.0 | B |
| Instructor: Cynthia L Estlund | | | |
| Procedure | LAW-LW 11650 | 5.0 | B |
| Instructor: Jonah B Gelbach | | | |
| Contracts | LAW-LW 11672 | 4.0 | B |
| Instructor: Barry E Adler | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Instructor: Maggie Blackhawk | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 15.5 | 15.5 |
| Cumulative | 15.5 | 15.5 |

**Spring 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Constitutional Law | LAW-LW 10598 | 4.0 | B |
| Instructor: Daryl J Levinson | | | |
| Lawyering (Year) | LAW-LW 10687 | 2.5 | CR |
| Instructor: Brandon Jeromy Johnson | | | |
| Legislation and the Regulatory State | LAW-LW 10925 | 4.0 | B |
| Instructor: Roderick M Hills | | | |
| Criminal Law | LAW-LW 11147 | 4.0 | B+ |
| Instructor: Sheldon Andrew Evans | | | |
| 1L Reading Group | LAW-LW 12339 | 0.0 | CR |
| Instructor: Catherine M Sharkey | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.5 | 14.5 |
| Cumulative | 30.0 | 30.0 |

**Fall 2022**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Education Law Seminar | LAW-LW 11448 | 3.0 | A |
| Instructor: Dennis David Parker | | | |
| Professional Responsibility and the Regulation of Lawyers | LAW-LW 11479 | 2.0 | B+ |
| Instructor: Stephen Gillers | | | |
| Evidence | LAW-LW 11607 | 4.0 | B |
| Instructor: Erin Murphy | | | |
| Teaching Assistant | LAW-LW 11608 | 1.0 | CR |
| Instructor: Brandon Jeromy Johnson | | | |
| Domestic Violence Law Seminar | LAW-LW 12718 | 2.0 | A |
| Instructor: Emily Joan Sack | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 12.0 | 12.0 |
| Cumulative | 42.0 | 42.0 |

**Spring 2023**

School of Law
Juris Doctor
Major: Law

| | | | |
|---|---|---|---|
| Contemporary Issues in Immigration Law and Policy Seminar | LAW-LW 10020 | 3.0 | A- |
| Instructor: Omar Cassim Jadwat<br>Judy Rabinovitz | | | |
| Criminal Procedure: Post Conviction | LAW-LW 10104 | 4.0 | B+ |
| Instructor: Emma M Kaufman | | | |
| Teaching Assistant | LAW-LW 11608 | 1.0 | CR |
| Instructor: Brandon Jeromy Johnson | | | |
| Property | LAW-LW 11783 | 4.0 | B |
| Instructor: Katrina M Wyman | | | |
| Race and the First Amendment Seminar | LAW-LW 12851 | 2.0 | A |
| Instructor: Emerson J Sykes | | | |

| | AHRS | EHRS |
|---|---|---|
| Current | 14.0 | 14.0 |
| Cumulative | 56.0 | 56.0 |

Staff Editor - Review of Law & Social Change 2022-2023

**End of School of Law Record**

## TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
## JD CLASS OF 2023 AND LATER & LLM STUDENTS

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

| **First-Year JD (Mandatory)** | **All other JD and LLM (Non-Mandatory)** |
|---|---|
| A+: 0-2% (target = 1%) (see note 1 below) | A+: 0-2% (target = 1%) (see note 1 below) |
| A: 7-13% (target = 10%) | A: 7-13% (target = 10%) |
| A-: 16-24% (target = 20%) | A-: 16-24% (target = 20%) |
| ***Maximum for A tier = 31%*** | ***Maximum for A tier = 31%*** |
| B+: 22-30% (target = 26%) | B+: 22-30% (target = 26%) |
| ***Maximum grades above B = 57%*** | ***Maximum grades above B = 57%*** |
| B: remainder | B: remainder |
| B-: 0-8%* | B-: 4-11% (target = 7-8%) |
| C/D/F: 0-5% | C/D/F: 0-5% |

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

| | |
|---|---|
| ***Pomeroy Scholar:*** | Top ten students in the class after two semesters |
| ***Butler Scholar:*** | Top ten students in the class after four semesters |
| ***Florence Allen Scholar:*** | Top 10% of the class after four semesters |
| ***Robert McKay Scholar:*** | Top 25% of the class after four semesters |

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

**Updated: 10/4/2021**

nclej
National Center for Law and Economic Justice

Joining with low-income people to fight for fairness

50 Broadway, Suite 1500, New York, NY 10004-3821
ph: 212-633-6967 fax: 212-633-6371 www.nclej.org



June 12, 2023

**RE: Yasmeen Metellus, NYU Law '24**

Your Honor:

I submit this recommendation in enthusiastic support of Ms. Metellus' application for a judicial clerkship. In addition to my full-time employment as the Executive Director of the National Center for Law and Economic Justice, I have the pleasure of serving as an adjunct professor at NYU Law School where I had the pleasure of teaching a fall seminar in Education Law and Policy in which Ms. Metellus was a student. Based upon her work in that class, I recommend her to you without reservation.

I found Ms. Metellus to be a fully engaged student who was well prepared for class discussions and a very active participant in those discussions. She drew upon her personal experiences when discussing the impact of the complicated legal decisions relating to education and demonstrated a firm grasp of the complexity of the related law. I was particularly impressed by her enthusiasm for exploring difficult issues in education law. The final paper in the course was on a subject of the student's choosing. In preparation for that paper, she scheduled a meeting with me in which she suggested several potential paper topics in which she was interested. Her ultimate choice of paper topic was on a subject with which I was not familiar, the impact of college withdrawal and reinstatement policies on students experiencing mental health problems including suicidal ideation. The paper explored numerous issues involving liability of institutions of higher learning under tort and disability law. It then suggested recommendations to protect the interest of the schools and the students. I thought it illustrated Ms. Metellus' skills at legal analysis as well as her writing skills.

I found Ms. Metellus to be such a positive addition to the class that I was extremely pleased when she accepted my offer to return as a Teaching Assistant this fall. I believe that her knowledge of education law as well as her personal skills will be invaluable in the class. I believe those skills would also serve her well as a judicial clerk. Putting on my executive director hat, I know that I would be pleased to have an attorney like her work for my organization.

Please let me know if I can provide any further information.

Best regards,

Dennis D. Parker

Dennis D. Parker

NYU LAW

**EMERSON J. SYKES**
*Adjunct Professor of Law*
*Senior Staff Attorney, American Civil Liberties Union*

**NYU School of Law**
40 Washington Square South
New York, NY 10012
**P:** 212 998 6100
**M:** 650 804 0234
ejs428@nyu.edu

June 12, 2023

**RE: Yasmeen Metellus, NYU Law '24**

Your Honor:

I am writing to enthusiastically recommend Yasmeen Metellus, a rising 3L at NYU School of Law, for a clerkship in your chambers. Yasmeen was an exceptional student in a seminar I taught this semester, Race and the First Amendment. I was deeply impressed by her intellectual acuity, diligence, and interpersonal grace. I have no doubt that she will contribute immensely in any professional setting.

The Race and the First Amendment Seminar was largely discussion-based and of the nineteen students, no one more consistently contributed insightful questions and comments to the discussion. Throughout the semester, and in particular during a simulation exercise near the end of the term, she was able to make creative connections between key themes in the course material, displaying a nuanced appreciation for underlying principles and norms. At the same time, she displayed the ability to thoughtfully reason through complicated fact patterns and she was able to clearly articulate multiple considerations that informed her thinking. While displaying her mastery of the course material, she often drew on experiences outside of class, either personal or professional, to provide examples to support her points. Yasmeen also asked probing questions of me and her classmates when topics were unclear or seemed unjust, a testament to both her bravery and willingness to be vulnerable intellectually.

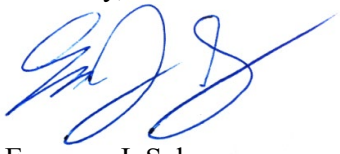
Yasmeen wrote her final paper in the style of an amicus brief on behalf of Miami Dream Defenders in *Falls v. DeSantis*, a case that was pending in the Northern District of Florida challenging the Stop W.O.K.E. Act in K-12 public schools and universities. Students had the option of writing a comment-style paper or an amicus brief in a pending case and Yasmeen chose the latter. Early in the semester, she identified the issue she wanted to address – bans on inclusive education in Florida. She then identified a case that would be a viable vehicle for the issue she wanted to address and decided on an amicus client that would most compellingly convey her perspective. The idea for the paper was sound and the execution was exemplary. Yasmeen's brief was among the strongest in the class, balancing information with argumentation, all in an appropriately authoritative tone. She was able to write a convincing amicus brief without extensive previous experience with this type of writing. It bodes well for her ability to learn new styles of legal writing throughout her career.

Yasmeen frequently attended office hours to discuss the week's reading, talk through her final paper idea, or ask career-related questions. She was always well prepared with

thoughtful questions and consistently asked follow-up questions that displayed her strong legal analysis skills as well as her curiosity and thirst for knowledge. Yasmeen never boasted about her many accomplishments and leadership roles during the seminar, but I have come to learn that her eagerness to engage in office hours is indicative of her inclination to seize opportunities for growth and learning. Through her myriad extracurricular endeavors and personal commitments, Yasmeen has contributed immensely to the NYU Law community and the many other communities she holds dear. With her combination of intelligence, passion for justice, and professionalism, she is well equipped to achieve all of her ambitious goals.

I have no doubt that Yasmeen will be an excellent clerk. She takes joy and pride in working through complicated legal and factual issues, so it is easy to imagine her thriving in a clerkship. She quickly grasps new ideas and integrates them with what she already knows about the law and the world, another important trait for a clerk. All the while, Yasmeen displays a communitarian approach that will make her a principled advocate and a pleasure to work with. I am proud to recommend such an exceptional student and impressive young person.

Sincerely,



Emerson J. Sykes
Adjunct Professor of Law, NYU Law
Senior Staff Attorney, ACLU

NYU LAW

**EMILY J. SACK**
*Adjunct Professor of Law*

*Professor of Law, Roger Williams University School of Law*

**NYU School of Law**
40 Washington Square South
New York, NY 10012
**P:** 401 254 4603
ejs2163@nyu.edu

June 12, 2023

**RE: Yasmeen Metellus, NYU Law '24**

Your Honor:

I am writing to give my highest recommendation for Yasmeen Metellus, who is applying for a clerkship position in your chambers. Yasmeen has exceptional research, writing and critical thinking skills, and she also possesses a strong drive and commitment to excellence. As detailed below, I believe Yasmeen will make an outstanding judicial clerk.

I got to know Yasmeen well as a student in my Domestic Violence Law seminar at NYU Law School this past fall. I am a tenured full professor at Roger Williams University School of Law, and also serve as an adjunct professor of law at NYU. For the seminar, students were required to write a lengthy paper with original research and make a presentation on their topic which was designed to elicit class discussion. Yasmeen chose to write on the challenging topic of nonconsensual condom removal (known as "stealthing"), with a particular focus on the prevalence of this practice on college campuses. This is a very recently identified legal issue, with little existing case law or legal commentary. I met with Yasmeen several times to discuss and review her work, and I was struck by her commitment to determining the best way to conceptualize the harm caused by stealthing, and to achieve legal recourse for victims. Because stealthing doesn't quite "fit" into existing categories in tort or criminal law, this was a complex task.

In the paper, Yasmeen did a masterful job in exploring the harms to victims of stealthing and concluding that it is best conceived of as a form of sexual violence, reproductive coercion, and intimate partner violence. She then examined potential civil and criminal remedies for this conduct. In particular, she recognized that the current legal understanding of lack of consent in both criminal and tort law regarding sexual assault might not be inclusive of victims who initially agree to sex with a condom, only to find that the primary condition (condom usage) of their consent has been removed. Because the UK and other countries have been leaders in legal recognition of the harm caused by this conduct, she examined international legislation and case law. Ultimately, Yasmeen proposed adoption of a conditional consent standard in both civil and criminal law that would capture the harms caused by stealthing. She also proposed amendments to Title IX to provide remedies for stealthing victims on college campuses. She thoroughly discussed both the benefits and potential harms of these various remedies and her proposals were both detailed and nuanced. This was truly innovative and original work.

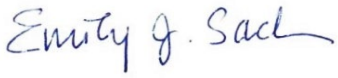
Yasmeen also made an excellent presentation to the class, which ignited a very engaged class discussion and demonstrated real skill in making a topic come alive to other students.

Beyond this presentation, she was a regular contributor to class discussion, where she consistently made thoughtful and intelligent comments. Not surprisingly, she received an A in the class, based on both her paper and her in-class performance.

Beyond her top-notch academic skills there are some common themes throughout Yasmeen's many activities and accomplishments: leadership, initiative, mentorship, and dedication to public service. To give just a few examples, while an undergraduate at Columbia, she started and led a Black Pre-Professional Society to provide Black students with support to secure internship opportunities and full-time jobs. She organized workshops, organized a speaker series, and invited recruiters to meet with the Society members, taking the organization from a small start-up to a Society with more than 600 members. At NYU Law School, she holds leadership positions in both the Black Allied Law Students Association and the Women of Color Collective. Yasmeen is President of the High School Leadership Institute, where she teaches debating skills to NYC high school students. Before and during Law School, she worked with Ignite International, which encourages young women to run for political office and become involved in legislative advocacy. She worked with over 100 young college women and has told me how much she has enjoyed teaching and working with students. Yasmeen was also selected to serve as a Birnbaum Women's Leadership Fellow and served as a teaching assistant for NYU's Lawyering/Legal Writing class this past year. Next year she will be a teaching assistant for the Education Law class. She also holds the position of Senior Staff Editor on NYU's Review of Law and Social Change and is a member of the mock trial team.

Though I have taught many highly talented students, Yasmeen stands out as someone with not only excellent academic skills, but also a dedication to working in underserved communities and mentoring young people, with the organizational and leadership skills to achieve her goals. This is a rare combination of qualities that will make Yasmeen an excellent judicial clerk, attorney, and advocate. Yasmeen is a highly mature, likeable, energetic, and professional young woman who is engaged with the world and would integrate well into your chambers. She is truly a superlative candidate, and I hope that you will give her your closest consideration. I would be happy to provide any further information that would be helpful to you, and I can be reached at 401-254-4603 or ejs2163@nyu.edu. Thank you very much for your attention.

Sincerely,



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## Cover Page:

This paper was written for my Race and First Amendment seminar in Spring 2023, taught by Professor Emerson Sykes. For this course, my professor instructed me to write a mock amicus brief from the viewpoint of the ACLU. My amicus brief was written in response to the *Falls v. DeSantis* case in the United States District Court, Northern District of Florida. For this amicus brief, I was tasked with arguing why Florida's Stop W.O.K.E Act violates the First Amendment. For brevity's sake, I have omitted some of the formatting, including the table of contents and table of authorities.

This is the unedited version of my paper, and it has not received additional corrections or feedback from my professor. I am the sole author of this academic work.

## STATEMENT OF ISSUE

This case is about whether the State has the power to silence the voices of educators and suppress information that students are exposed to in their classrooms by banning entire subjects from the curriculum deemed to be offensive by the government. The policy at issue is the Stop Wrongs Against Our Kids and Employees Act.

## FACTUAL BACKGROUND

On April 22, 2022, Florida Governor Ron DeSantis signed into law a ban on Critical Race Theory, known as the Stop Wrongs Against Our Kids and Employees Act (Stop W.O.K.E. Act) or Individual Freedom Act (the "Act"). According to the Florida Senate's Education Committee, the law was "designed to protect individual freedoms and prevent discrimination in the workplace and public schools" by enacting a prohibition on "subjecting" individuals to required training or instruction for topics such as bearing "personal responsibility" or feeling guilt for historic wrongdoings because of their race, gender, or national origin. [1]

The IFA amends Florida Statutes that govern required instruction in K- 12 public schools to mandate not just what topics K-12 public schools should include in their curricula, but how those topics must be taught. The Act's purpose is to create a "Woke-Free" Florida by singling out and eradicating discussion about topics such as Critical Race Theory. The IFA addresses Governor DeSantis's crusade against "wokeness" by forcing teachers to discuss material that

[1] Fla. S. Comm. on Education, SB 2809, 2022 Leg., Reg. Sess. (Fla. 2022), https://www.flsenate.gov/Committees/BillSummaries/2022/html/2809.

supports the six "principles of individual freedom" expressed in the bill in a manner that agrees with those principles or takes a neutral position. *See* §1003.42(3), Fla. Stat. (2022).

The act also forbids teachers from indoctrinating or persuading students to a particular view "inconsistent with the principles of this subsection or state academic standards." *See* §1003.42(3), Fla. Stat. (2022).

## SUMMARY OF ARGUMENT

As a constitutional matter, this case falls squarely within the line of cases beginning with *Tinker v. Des Moines Independent Community School District* and *Board of Education, Island Trees Union Free School District v. Pico*. In *Tinker*, the Court held that public school students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503, 506. These cases began to illustrate a right to freedom of speech and a right to access information. Then, in *Hazelwood School District v. Kuhlmeier*, the Supreme Court established the "Hazelwood test", requiring that a school's restriction on student access to information must be reasonably related to a "legitimate pedagogical concern." 484 U.S. 260, 262. Schools may regulate access to information if they can show that it would significantly interfere with the educational environment or the rights of others.

In this case, the government has not shown a legitimate pedagogical to support the Stop W.O.K.E Act. This policy seeks to transform schools into "enclaves of totalitarianism" Tinker *v. Des Moines Independent Community School District,* 393 U.S. 503, 507 (1969). The law purports to prioritize promoting civility and order within school settings, but this is a facade to conceal its underlying political objective of censoring or eradicating discourse and ideas

considered progressive or left leaning. For example, Governor DeSantis has publicly stated that he signed the bill to prevent the "far left woke agenda from taking over schools."[2]

There is also a long history of courts denying schools the right to prescribe what "shall be orthodox in politics, nationalism, or religion." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The law violates this longstanding rule by vowing to protect children from feelings of "guilt or shame" about the country's history and instill in students a sense of patriotism.[3] The court in *West Virginia State Board of Education v. Barnette* previously held that while schools have a legitimate interest in promoting patriotism and national unity, this interest can not override the students' right to freedom of speech and conscience. 319 U.S. 624, 642 (1943). In addition, claims that classroom conversations about race are uncomfortable and thus inappropriate for students ignore an emerging body of research that shows that culturally relevant pedagogy benefits white students and students of color. [4]

The Stop W.O.K.E Act carries severe consequences for high school students, particularly those of color, as attested by the words of those who may be directly affected. Cyara Pestaina, an 18-year-old student at Miami Dade County High School, has voiced concern that the legislation would deprive students of opportunities to delve into the role of African history in the United States, stating, "We don't get a lot of chances to look into how African history plays into this country [and] we talked about serious topics that are hard to talk about."[5] Meanwhile, Elijah

[2] Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination, (2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.
[3] Matt Papaycik, Florida's Governor Signs Controversial Bill Banning Critical Race Theory in Schools, WPTV, Apr. 22, 2022, https://www.wptv.com/news/education/floridas-governor-to-sign-critical-race-theory-education-bill-into-law.
[4] School Curricula and Silenced Speech: A Constitutional Challenge to Critical Race Theory Bans, 107 Minn. L. Rev. 1311, 1362.
[5] Vassolo, Martin, Miami students speak out after African American studies course canceled, Axios, Feb. 1, 2023, https://www.axios.com/local/miami/2023/02/01/florida-ap-african-american-studies-course-miami.

Andrews expressed regret that the proposed act could undermine his sense of cultural pride by censoring the history that is integral to his cultural identity. He explains, "You can't ask the right questions if you are not educated on anything."[6] Their statements illustrate the negative impacts of the Stop W.O.K.E Act on students' ability to engage in critical conversations about Black history.

Research shows that courses that included the history of marginalized peoples in a critical manner led to improved student outcomes and fostered feelings of belonging and inclusion among students of color. [7] Thus, it is essential to engage in evidence-based practices that reduce bias and promote positive student identities and a strong sense of belonging. The Stop W.O.K.E Act chills these discussions by prohibiting teachings and statements such as: "Black Americans have one-tenth of the wealth of white Americans on average" and "Black men receive harsher sentences for the same crimes as white men." [8] Eliminating these accurate statements prevents students from critically analyzing the world around them, hindering their growth and understanding.

The Stop W.O.K.E Act imposes unlawful restrictions on the First Amendment rights of students and creates a culture of censorship and oppression in the classroom that obstructs a student's right to access information. If this court holds that the Plaintiffs do have standing, an appropriate analysis of the merits must include consideration of the student's right to access information and the state of Florida's lack of pedagogical purpose for enacting the Stop W.O.K.E Act.

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[6] Vice News, This Student is Ready to Sue DeSantis Over Black History, YouTube (Mar. 29, 2022), [1:45], https://youtu.be/SCk186lI4wA.
[7] *Supra* Note 4
[8] *Specifications for the 2022-2023 Florida Instructional Materials Adoption, K-12 Social* Studies.

**I. K-12 students have the right to access information.**

High schools should be places of education - not indoctrination. And education is "necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). It is also well established that "the Constitution protects the right to receive information and ideas." *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965). And students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 507 (1969). The right to receive information is "an inherent corollary of the rights for free speech and press that are explicitly guaranteed by the Constitution." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive or consider them.' " *Id.* (quoting *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965)).

This right extends to also include exposure to controversial ideas, particularly in the context of the "development of a school curriculum." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027. *Monteiro* also emphasizes that schools should not limit access to materials that impose upon students "a political orthodoxy." 158 F.3d 1022 (9th Cir. 1998). By preventing the discussion of a supposed controversial topic like critical race theory in class, the government is "contract[ing] the spectrum of available knowledge" that students are exposed to. *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965). Therefore, a ban that restricts what can be discussed in a curriculum can be understood as an infringement on a student's right to receive information.

Courts have been hesitant to contract the spectrum of available knowledge due to concerns about restrictions on the quality of education received by students. In *Pico*, the court recognized that without the right to receive ideas, there would be no way for students to meaningfully exercise their own "rights of speech, press, and political freedom." 457 U.S. 853, 867 (1982). Furthermore, in *Keyishian v. Bd. of Regents*, the court articulated that 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). The court asserted that the classroom is the "marketplace of ideas" and that our country's future depends on students "trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritarian selection." *Keyshian*, 385 U.S. at 603. The Stop W.O.K.E Act seeks to contract this exchange of ideas by prohibiting instruction that suggests that individuals "bear responsibility for and must feel guilt, anguish or other forms of psychological distress." [9] Governor DeSantis' quest to outlaw speech deemed to make individuals feel discomfort runs contrary to the idea that students need to discover truth through a "multitude of tongues." 385 U.S. at 603.

## II. Under Hazelwood, the State Requires a Legitimate Pedagogical Purpose to Restrict Students' First Amendment Right to Receive Information

While students have the right to receive information, schools are allowed to restrict this access to information "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262. The *Hazelwood* standard is

[9] House of Representatives Staff, H.B. 7, 2022 Reg. Sess. (Fla. 2022), https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0007z1.JDC.DOCX&DocumentType=Analysis&BillNumber=0007&Session=2022.

appropriate in this case because the Stop W.O.K.E Act impacts the school curriculum. *See Peck v. Baldwinsville Cent. Sch. Dist*, 426 F.3d 617, 628-29 (2d Cir. 2005) (explaining that a class assignment is governed by Hazelwood because the assignment is incorporated into the curriculum); *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1214 (11th Cir. 2004) (stating that Hazelwood "controls school-sponsored expression that occurs in the context of a curricular activity"); *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir. 2002) (discussing how the district court applied Hazelwood "to activities conducted as part of the school curriculum."). The 11th Circuit also has a history of adopting the *Hazelwood* standard as its chosen test for school speech. For example, *in Virgil v. Sch. Bd. of Columbia Cnty., Fla.*, the Eleventh Circuit rejected the proposition that school officials have an unrestricted right to remove a textbook from their curriculum. 862 F.2d 1517, 1522-23 (11th Cir. 1989).

Courts have also previously held that "school-sponsored speech" includes substantive classroom discussions. *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) ("[A] school committee may regulate a teacher's classroom speech if ... the regulation is reasonably related to a legitimate pedagogical concern ...."). Courts have also applied the *Hazelwood* standard to instructive materials shown to students. *See Virgil.*, 862 F.2d at 1521-23. Given that the Stop W.O.K.E Act creates restrictions for K-12 classroom curriculum and supporting materials through its six "principles of individual freedom", courts should apply the *Hazelwood* test to this analysis. The Stop W.O.K.E Act does not serve a legitimate pedagogical purpose, and thus as per *Hazelwood*, should be deemed to violate students' First Amendment rights. *See generally Hazelwood Sch. Dist.*, 484 U.S. 260.

The State argues that its action was created to address "woke indoctrination" and boost civility, but this is merely a pretext, and if a state articulates a seemingly legitimate interest, a

plaintiff may establish a First Amendment violation by proving that the reasons offered by the state mask other illicit motivations. *See Pico,* 457 U.S. at 85.

This upcoming section will go through the justifications of the Act proffered by DeSantis and legislators and argue why each goal violates the *Hazelwood* test. [10] DeSantis' rationale is meant to mask his true goal of penalizing progressive viewpoints and targeting black studies.

### A. No legitimate pedagogical interest is served by forcing students to agree with a particular political viewpoint, or by punishing those who refuse.

While the Board of Education contends that this Act is meant to prevent indoctrination, this is merely a pretext for punishing the progressive/liberal viewpoint. The text of the bill prohibits "social-emotional learning." [11] This phrase is used to mask the government's purpose of eliminating progressive viewpoints. Secretary of Education Corcoran, previously told a crowd at Hillsdale College that Florida rewrote its standards because book publishers are "infested with liberals" and because books contain "crazy liberal stuff" that is hidden under "social emotional learning."[12] Governor DeSantis later explained that he signed the bill to prevent "the far left woke agenda" from "taking over our schools and workplaces." [13]

The usage of the word "woke' in the Act's name also has a hidden pretextual motive. The word "woke" is used as a replacement for liberal. For example, Governor DeSantis' team was

[10]Thus far, courts have articulated a variety of reasons that meet the legitimate pedagogical goal requirement. In *Tinker*, the court found that public school administrators ``retain some authority to restrict expressive activities that materially disrupt the educational mission of the school." 393 U.S. 503 at 513. They have also found that preventing the promotion of violation of the law, such as drug use is a legitimate goal. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

[11] *Specifications for the 2022-2023 Florida Instructional Materials Adoption, K-12 Social* Studies, https://www.fldoe.org/core/fileparse.php/5574/urlt/SocialStudies-IM-Spec.pdf

[12] Hillsdale College, *Education is Freedom: Featuring Commissioner Richard Corcoran,* at 33:30-39:24, Hillsdale College (May 14, 2021), https://www.youtube.com/watch?v=HVujpIator0.

[13] Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination, (2022), https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/.

asked to clarify the definition of "woke" or "woke indoctrination." DeSantis' Communications Director defined "woke" as a "slang term for activism … progressive activism" and a general belief in systemic injustices in the country.[14] These examples illustrate a concerted effort by the Governor and his team to ban progressive viewpoints under the guise of decreasing indoctrination.

By targeting the progressive viewpoint, this Act violates the *Hazelwood* test and standards outlined in *Pico*. *See generally Hazelwood Sch. Dist.,* 484 U.S. 260; *see also Pico,* 457 U.S. 853. The facts of this case are like the facts in *Arce. v. Douglas.* In *Arce,* the Ninth Circuit held that state officials needed a legitimate pedagogical interest to justify removing materials from classrooms. 793 F.3d 968, 983 (9th Cir. 2015). On remand, the court held that these curricular bans were based on partisan motives and thus unconstitutional. *Gonzalez v. Douglas*, 269 F. Supp. 948, 972-74 (D. Ariz. 2017). The court reasoned that by limiting the school curriculum in a partisan manner, schools are potentially restricting a "student's ability to develop the individualized insight and experience needed to meaningfully exercise her rights of speech, press, and political freedom." *Id*. (citing *Pico,* 457 U.S. at 867). In this instant case, the Act's ban on "woke indoctrination" and liberal viewpoints should be considered a "partisan motive" and therefore an illegitimate pedagogical purpose. *See generally Gonzalez,* 269 F. Supp. 948.

### B. The history of the STOP W.O.K.E Act suggests that it was motivated by racial animus.

The history and context of the Act reveal that its enactment was fueled by racial animus. In his legislative announcement, DeSantis argues that the Act is meant to "take a stand against

[14] Miami Herald Editorial Board, What Ron DeSantis' War on Woke Really Means, Miami Herald (Dec. 7, 2022), https://www.miamiherald.com/opinion/editorials/article269675311.html.

state-sanctioned racism".[15] This is a pretextual motive; the language and history of the Act suggest that its passing was motivated by racial animus. Under *Pico*, the court found that the student's constitutional rights would be violated if a school board, "motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration." *Pico*, 457 U.S.at 871. The Stop W.O.K.E Act seems to follow the same actions prohibited in *Pico* by targeting books written by black authors and books advocating for racial equality. Once again, this goes against the precedent outlined in *Pico*. Last May, the Department of Education for the state, released a 6,000-page report reviewing books used in Florida curriculums. The report noted instances where books were rejected for mentioning "racial profiling in policing" and "types of housing for different groups of people."[16] DeSantis and the Florida Department of Education deemed that this form of content was an attempt to indoctrinate students. The Department's media training also recommends that districts remove divisive content such as social justice theory. These restrictions have led to many school districts flagging books and learning materials as potential violations of the Stop W.O.K.E Act. [17] One book publisher mentioned creating multiple versions of social studies materials by softening or eliminating references to race.[18] Other sources have pointed out that compliance with the act has caused concerns over the "outsized attention" to slavery and "the negative treatment of Native Americans" in some textbooks. As a result, many textbooks with "outsized" attention to these

[15] Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations, FLORIDA OFFICE OF THE GOVERNOR (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/.
[16] Andrew Atterbury, Mystery solved? Florida reveals why it rejected math books over critical race theory, Politico (May 5, 2022), https://www.politico.com/news/2022/05/05/fldoe-releases-math-textbook-reviews-00030503.
[17] *Id*.
[18] Mervosh, Sarah. "Florida Scoured Math Textbooks for 'Prohibited Topics.' Next Up: Social Studies." The New York Times, March 16, 2023, https://www.nytimes.com/2023/03/16/us/florida-textbooks-african-american-history.html.

topics are under review.[19] These examples demonstrate that the Act seems to target diverse literature and "books advocating for racial justice".

Although the Department of Education would proffer that the Act explicitly bans the teaching of classic racism, i.e., that "one race is superior to another race", the act functionally bans the teaching of the history of racism and experiences of Black Americans. Just as the *Pico* case did not allow for the elimination of the book "Black Boy" from the curriculum, books related to racial injustice and social justice should not be eliminated under the guise of preventing indoctrination. 457 U.S.at 871.

It could be argued that this case is like *Bethel Sch. Dist. v. Fraser*, where the court found that a student's freedom to "advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." 478 U.S. 675, 681 (1986). The government could argue that the Stop W.O.K.E Act is justified by its legitimate interest in teaching "fundamental values of civilized society," including "the essential lessons of civility." 478 U.S. 675, 685-86. However, this case is distinguishable from *Bethel*. Firstly, the true intent of this Act is to target Black voices in literature and history, not to teach "lesson of civility." And, even if civility is the goal of the legislation, courts evaluate First Amendment restrictions using a balancing test. Schools have a legitimate interest in maintaining order and discipline, but this interest "must be balanced against the student's First Amendment rights." *Tinker*, 393 U.S. 503, 513-14. This implies that legislators cannot argue that teaching civility negates a student's free speech right in its entirety.

[19] *Id*.

Furthermore, courts have historically considered the reasonability of a stated pedagogical goal when analyzing if it meets the *Hazelwood* standard. In *Morse v. Frederick*, the Supreme Court held that schools may prohibit speech that is reasonably viewed as promoting illegal drug use. *Morse v. Frederick*, 551 U.S. 393, 422 (2007). The court stated that "the question is not simply whether the message can be characterized as advocating a particular viewpoint, but whether the message is one that reasonable observers would interpret as advocating illegal drug use." *Id.* The Supreme Court articulated that an interpretation is reasonable based on the totality of the circumstances, including the content of the speech, the context in which the speech occurred, and how the speech would be understood by the intended audience. *See* 551 U.S. at 402. It is difficult to see how social justice teachings would reasonably be perceived to be advocating for racism. For example, according to the Florida Department of Education's material adoption worksheet, the Stop W.O.K.E Act prohibits social justice concepts such as:

> Seeking to eliminate undeserved disadvantages for selected groups. Undeserved disadvantages are from the mere chance of birth and are factors beyond anyone's control, thereby landing different groups in different conditions. Equality of treatment under the law is not a sufficient condition to achieve justice.[20]

While proponents of the ban may argue that these banned social justice concepts promote division and resentment between races, a reasonable observer would not interpret these statements as advocating for racism or discrimination. Social justice and racial studies aim to

[20] *Specifications for the 2022-2023 Florida Instructional Materials Adoption, K- 12 Social* Studies, https://www.fldoe.org/core/fileparse.php/5574/urlt/SocialStudies-IM-Spec.pdf

address and eliminate systemic racism by acknowledging and examining its historical and present-day effects.[21]

In addition, the prohibited language discussed in the materials adoption sheet shares factual similarities to the banned program in the *Gonzalez v. Arizona* case. In that case, the court noted that the superintendents had "no legitimate basis for believing that the MAS program was promoting racism." 485 F. Supp. 3d 980, 1010 (D. Ariz. 2020). To determine whether the district had a "legitimate basis", the court looked at the district's stated reasons for the removal, which included claims that the program was promoting racial resentment. *Id*. The court found that the district's reasons were not supported by any evidence and were based on a "misguided perception" of the MAS program. *Id*. The court also noted that the district had not conducted any formal evaluation of the program or sought input from qualified experts in the field before deciding to remove it. *Id*. Similarly, a ban on critical race theory and social justice concepts assumes that its objectives are to promote a divisive and harmful ideology without a full understanding of what these theories entail. [22] Without a legitimate basis for this assumption[23], the ban on critical race theory is similarly a violation of students' First Amendment rights since it is based on a misguided perception of the program's content and objectives.

[21] Aspen Institute. "Honoring America's Racial and Ethnic Diversity in Education." https://www.aspeninstitute.org/wp-content/uploads/2021/10/Aspen-Institute_UnitedWeLearn.pdf.
[22] In fact, many have asserted that the crux of this ban is based on the writing and teaching of one person, Christopher Rufo. *See* Wallace Benjamin, How a Conservative Activist Invented the Conflict Over Critical Race Theory, New Yorker, June 18, 2021, https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory
[23]The State's fear of critical race theory is based on a misperception of critical race theory. Critical race theory is not a single ideology. It was developed by a variety of academics that sought to expand their graduate curriculums and explore interactions between racial hierarchies and the law. Through the passage of the STOP W.O.K.E Act, DeSantis is operating under false assumptions about the origins and teaching of critical race theory. He is conflating the theory with social justice and discussions about race when there is no one cohesive definition of Critical Race Theory. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

### C. Patriotism is not a legitimate pedagogical goal.

The government also asserted that the ban on woke indoctrination was necessary to foster a sense of national unity. DeSantis' legislative announcement clearly articulates that the state intends to compel a sense of patriotism from its students; he states, "we won't allow Florida tax dollars to be spent teaching kids to hate our country or to hate each other." [24] He further went on to state:

> "As the Governor of Florida, I love this state, and I love my country. I find it unthinkable that there are other people in positions of leadership in the federal government who believe that we should teach kids to hate our country. We will not stand for it here in Florida." [25]

Although critically examining the history of racism in America might dampen students' patriotism, students' First Amendment rights cannot be infringed in the name of "national unity" or "patriotism." *Barnette*, 319 U.S. at 642. The court in *Barnette* held that a forced pledge of allegiance was not just a tool to shape learning, but the goal was to compel patriotism. The Supreme Court held that the state cannot compel an "attitude of mind", and additionally, the Court recognized that while schools have an interest in promoting national unity, this interest cannot "override the students' right to freedom of speech and conscience." 319 U.S. 624, 642-43 (1943). Thus, patriotism is not a legitimate pedagogical goal that can be enforced. *See Id.* at 633.

[24] Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations, FLORIDA OFFICE OF THE GOVERNOR (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/.

[25] Governor DeSantis Emphasizes Importance of Keeping Critical Race Theory Out of Schools at State Board of Education Meeting, https://www.flgov.com/2021/06/10/governor-desantis-emphasizes-importance-of-keeping-critical-race-theory-out-of-schools-at-state-board-of-education-meeting/

Even if this court decides that patriotism is a legitimate goal that could override other free speech interests, we must analyze this goal and determine if a reasonable observer would interpret social justice teachings as an attack against patriotism. *Morse*, 551 U.S. 393, 422. As stated in *Morse*, we look to the context of the banned speech to determine how a reasonable person would interpret it. *Id.*

It is unreasonable to assume that patriotism is lost when curricula allow for diverse voices that discuss social justice issues. On the contrary, studying a broad range of perspectives in history might awaken a deeper kind of patriotism in students. Research has shown that social justice studies "involves an appreciation for the sacrifices made to achieve what racial progress has been made to date, a commitment to help shape a more racially just future for this country."[26] It is potentially dangerous and unreasonable for the Department of Education to conflate the study of racial equality with hatred for one's country.

**D. Discomfort is not a legitimate pedagogical goal.**

Another purported purpose of this Act is to reduce feelings of anxiety that students may experience in the classroom. The act prohibits discussions that compel students to believe that "[A]n individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race, color, sex, or national origin." §1000.05(4)(a), Fla. Stat. (2022). Florida legislators that supported the bill, like Representative Stargel, have echoed this sentiment: "The message today — and I heard it said multiple times — that we of white privilege

[26] Critical Race Theory: Last Week Tonight with John Oliver, YOUTUBE (Feb. 21, 2022), https://www.youtube.com/watch?v=EICp1vGlh_U. (Featuring a video clip of Professor Kimberle Crenshaw arguing that "critical race theory is not anti-patriotic; in fact, it is more patriotic than those who are opposed to it, because we believe in the Thirteenth, and the Fourteenth, and the Fifteenth Amendments")

are supposed to feel guilt and shame. I don't subscribe to that." [27] Courts have previously held that fear of student discomfort is not a legitimate reason for abridging free speech rights. In *Tinker*, the court held that the State "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S., at 509. And, where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Id*. The court in *Hazelwood* affirmed this line of reasoning by holding a showing of discomfort does not override the constitutional right to speech, and students have freedom of expression unless there is a valid reason to regulate their speech. 484 U.S. at 281.

While it could be asserted that the Act's true goal is to instill discipline, courtesy, and respect, there is still no basis to assert that social justice teaching or critical race theory undermines these goals. [28]

**III. The Stop W.O.K.E Act is overbroad and criminalizes a wide range of protected speech.**

Even if this court were to accept the state's proffered reasons for enacting the act as having a legitimate pedagogical purpose, the statute still suffers from overbreadth issues. Overbroad laws violate the First Amendment because they punish "a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615

[27] Matt Papaycik, Florida's Governor Signs Controversial Bill Banning Critical Race Theory in Schools, WPTV, Apr. 22, 2022, https://www.wptv.com/news/education/floridas-governor-to-sign-critical-race-theory-education-bill-into-law.

[28] As stated above, a curriculum that focuses on race and injustice may yield better academic and behavioral outcomes for students. *Supra* Note *5*.

(1973)); see also *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (holding that " a law that is overbroad may suppress constitutionally protected speech as well as unprotected speech."). Courts have also held that regulations that restrict lawful speech "must be carefully scrutinized and narrowly tailored to its purpose." This overbreadth doctrine exists to prevent the kind of chilling of constitutional speech that the Stop W.O.K.E Act creates.

The State ignores the blatantly overbroad language in the statute by claiming that the Act does not criminalize discussions about African American history. Florida Commissioner of Education Manny Diaz, Jr. posted on Twitter: "We proudly require the teaching of African American history," "We do not accept woke indoctrination masquerading as education."[29] In DeSantis' March 2023 news release, he attempted to "debunk" the myth that Florida does not allow for the study of African American studies.[30] He argued that instruction on African American History had only expanded. He cited the following as being included in Florida's official curriculum: "the history of African peoples before the political conflicts that led to the development of slavery, the passage to America, the enslavement experience, abolition, history and contributions of Americans of the African diaspora to society."[31]

The text and current application of the Stop W.O.K.E Act do not support the assertion that the act expands instead of contracts the teaching of African American history. When determining if a statute goes beyond its "plainly legitimate sweep", courts historically consider "the text of the statute, its legislative history, and its purpose" and "the way in which the law has been applied." *See United States v. Stevens*, 559 U.S. 460, 474 (2010). The Act bans discussions

[29] Bernstein, Sharon. "Florida 'proudly' teaches African American history, official says, as he defends rejecting AP course." Reuters, January 20, 2023, https://www.reuters.com/world/us/florida-proudly-teaches-african-american-history-official-says-he-defends-2023-01-21/.
[30] Governor Ron DeSantis Debunks Book Ban Hoax, News Release, Governor Ron DeSantis (March 8, 2023), https://www.flgov.com/2023/03/08/governor-ron-desantis-debunks-book-ban-hoax/.
[31] *Id.*

that "attempt to indoctrinate or persuade students to a viewpoint inconsistent with Florida standards." These banned discussions include conversations about social justice and culturally responsive teaching. As a result of these sweeping bans, educators have been cautious about their discussion materials potentially falling under the umbrella of prohibited topics. Philip Belcastro, an educator in Pinellas County, has interpreted the Act to mean that he might not be able to teach books with diverse authors such as *A Raisin in the Sun* by Lorraine Hansberry or *Their Eyes Were Watching God* by Zora Neale Hurston. [32] Out of fear, school officials in Manatee and Duval Counties have directed teachers to wrap up their classrooms so that their books can go through more intensive reviews. [33] Renell Augustin, a high school teacher at Florida Public School, discussed that he is hesitant to discuss books relating to the suppression of the African Slave Trade. He is worried that these discussions would run afoul of the State's ban on social justice discussions. According to Pen America, HB7 has also led to an increase in banned books like *The Bluest Eye*, *Kite Runner*, and *Beloved*. Many of these books have been pulled from shelves out of fear that school districts will violate HB7. [34] In addition, many educators expressed worry over the Act's commitment to eliminating feelings of "discomfort, guilt, anguish, or any other form of psychological distress." §1000.05(4)(a), Fla. Stat. (2022). Jeff Solocheck, an education report in Tampa Bay argues that not only is it difficult to comply with this standard but is also forces teachers to censor themselves and err on the side of caution." [35]

[32] Alvarez, Maximillian. "'You're going to see more books get banned': teachers describe Florida's war on public schools.", The Real News, April 5, 2023. https://therealnews.com/youre-going-to-see-more-books-get-banned-floridas-war-on-public-schools.
[33] Natanson, Hannah, Hide the Books to Stop the Felony Charges, The Washington Post, Jan. 31, 2023, https://www.washingtonpost.com/education/2023/01/31/florida-hide-books-stop-woke-manatee-county-duval-county-desantis/.
[34] Zizo, Christie. "Here are the books banned from Central Florida schools." Click Orlando, February 9, 2023, https://www.clickorlando.com/news/local/2023/02/09/here-are-the-books-banned-from-central-florida-schools/.
[35] Skoog, Tim, The politics, and policies behind Ron DeSantis, WBUR, March 3, 2023, https://www.wbur.org/onpoint/2023/03/03/the-politics-and-policies-behind-ron-desantiss-reshaping-of-florida-education

He goes on to state: "What might make one person feel discomfort might not make another person feel discomfort." [36] This uncertainty instills fear in teachers and may cause them eliminate discussions from lectures that might violate this portion of the Act.

These examples make it evident that the current "application of the law" fosters an environment where constitutional speech is being threatened. The excessively broad reach of the Act has generated apprehension among educators, and as a result, there is an increase in diverse authors being pulled off the shelf to avoid violating the Stop W.O.K.E Act. These additional restrictions serve as a clear indication that the Stop W.O.K.E Act is overbroad and subsequently chills vital classroom discussions.

## CONCLUSION

The STOP W.O.K.E Act not only limits academic freedom but also hinders the ability of Florida students to access information. We must safeguard the right of students to be exposed to a diverse array of ideas, regardless of whether these ideas are uncomfortable for lawmakers in Florida.

[36] *Id.*

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